173

(1)

Supreme Court, U.S.
FILED

No. 10-10-559

OCT 22 2010

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,

Petitioners,

v.

TIM TUBRA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITION FOR A WRIT OF CERTIORARI

MARK E. CHOPKO
STRADLEY RONON STEVENS & YOUNG, LLP
1250 Connecticut Ave., N.W.
Suite 500
Washington, DC 20036
(202) 822-9611
mchopko@stradley.com

JOHN T. KAEMPF
Counsel of Record
BROOKSBY KAEMPF PC
121 S.W. Morrison Street
Suite 1100
Portland, OR 97204
(503) 295-7755
jkaempf@brooksbykaempf.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does the First Amendment to the U.S. Constitution bar a pastor's defamation claim against the church that employed him when the claim is based entirely on statements made by church officials solely within the church explaining to its members why the church disciplined and terminated the pastor?

CORPORATE DISCLOSURE STATEMENT

Petitioner The International Church of the Foursquare Gospel (the "Church") has no parent corporation and no publicly held company owns more than 10 percent of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINION AND ORDERS BELOW	1
BASIS FOR JURISDICTION	2
RELEVANT CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
A. A Case of First Impression for This Court	2
B. The Underlying Termination Dispute Between a Church and its Pastor	4
C. Grant of First Amendment Relief by the Trial Court after Verdict	7
D. Court of Appeals of Oregon Reverses and Rejects First Amendment Defense	9
REASONS FOR GRANTING THE PETITION	11
A. The Absence of Definitive Guidance by This Court Has Created a Conflict Among the Lower Courts About Whether the First Amendment Bars a Pastor's Defamation Claim Against His Church Arising Out of His Discipline and Termination by The Church	11

TABLE OF CONTENTS—Continued

Page

B. The Decision Below Conflicts With Decisions of this Court and Signals a Need for this Court to Protect the Rights of Religious Institutions. 22

CONCLUSION 35

APPENDICES

APPENDIX A: Supreme Court of Oregon's Order Denying Review 1a

APPENDIX B: Court of Appeals of Oregon's Published Opinion 2a

APPENDIX C: Trial Court's Order Granting JNOV Motion 28a

APPENDIX D: Plaintiff's Third Amended Complaint 30a

APPENDIX E: Verdict 46a

APPENDIX F: Pastor Swor's Letter 48a

APPENDIX G: Pastor Cooke's Email 52a

TABLE OF CITED AUTHORITIES

CASES Page

Bourne v. Center on Children, 838 A.2d 371 (Md. App. 2003), *rev. denied*, 846 A.2d 401 (Md. 2004) 16, 25
Brady v. Pace, 108 S.W.3d 54 (Mo. App. 2003) 17-18, 22
Brazauskas v. Fort Wayne-South Bend Diocese, Inc., 714 N.E.2d 253 (Ind. App. 1999) 17
Calvary Christian School, Inc. v. Huffstuttler, 238 S.W.3d 58 (Ark. 2006) 11, 21
Cha v. Korean Presbyterian Church of Washington, 553 S.E.2d 511 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002) 13-14, 22, 25
Connor v. Archdiocese of Philadelphia, 975 A.2d 1084 (Pa. 2009) 20
Corp. of The Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) 23, 33
Dippold v. Cathlamet Timber Co., 193 P. 909 (Or. 1920) 22, 30
Downs v. Roman Catholic Archbishop of Baltimore, 683 A.2d 808 (Md. App. 1996) 18-19, 26
Drevlow v. Lutheran Church, 991 F.2d 468 (8th Cir. 1993) 21
Employment Division v. Smith, 494 U.S. 872 (1990) 27-28
Farley v. Wisconsin Evangelical Lutheran Synod, 821 F.Supp. 1286 (D. Minn. 1993) 30
Goodman v. Temple Shir Ami, Inc., 712 So.2d 775 (Fla. App. 1998) 16

TABLE OF CITED AUTHORITIES—Continued

Page

Hayden v. Schulte, 701 So.2d 1354 (La. App. 1997), *writ denied*, 709 So.2d 737 (La. 1998) 25

Heard v. Johnson, 810 A.2d 871 (D.C. 2002) ..... *passim*

Higgins v. Maher, 258 Cal. Rptr. 757 (Cal. App. 1989), *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990) 16-17, 24

Hiles v. Episcopal Diocese of Massachusetts, 773 N.E.2d 929 (Mass. 2002) 16, 26

House of God v. White, 792 So.2d 491 (Fla. App. 2001) 21

Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) 17, 26

In re Godwin, 293 S.W.3d 742 (Tex. App. 2009) 17

Jackson v. The Presbytery of Susquehanna Valley, 697 N.Y.S.2d 26 (N.Y. App. 1999).. 16

Jacobs v. Mallard Creek Presbyterian Church, 214 F.Supp.2d 552 (W.D. N.C. 2002) 16, 26

Jeambey v. The Synod of Lakes and Prairies, 1995 WL 619814 (Minn. App. 1995) 16

Jones v. Wolf, 443 U.S. 595 (1979) 26-27

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 28

Lynch v. Donnelly, 465 U.S. 668 (1984) 22

Marshall v. Munro, 845 P.2d 424 (Alaska 1993) 19-20

TABLE OF CITED AUTHORITIES—Continued

Page

McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178 (1936) 22, 30
Meyer v. The Episcopal Diocese of Oregon, Multnomah County (Oregon) Circuit Court Case #1003-03934..... 32
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 30
Ogle v. Church of God, 153 Fed. Appx. 371 (6th Cir. 2005)..... 16, 26
Olson v. Luther Memorial Church, 1996 WL 70102 (Minn. App. 1996) 27
Patton v. Jones, 212 S.W.3d 541 (Tex. App. 2006), *rev. denied* (Tex. January 12, 2007)..... 14, 26
Reynolds v. Wood, 998 So.2d 1058 (Ala. App. 2007), *rev. denied* (Ala. June 20, 2008)..... 15
Schoenhals v. Mains, 504 N.W.2d 233 (Minn. App. 1993)..... 18
Seefried v. Hummel, 148 P.3d 184 (Colo. App. 2005), *rev. denied*, 2006 WL 2590062 (Colo. 2006)..... 15-17, 29-31
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)..... 26, 28
State ex rel Gaydos v. Blaeuer, 81 S.W.3d 186 (Mo. App. 2002) 31
Stepek v. Doe, 910 N.E.2d 655 (Ill. App. 2009), *appeal denied*, 919 N.E.2d 366 (Ill. 2009)..... 15, 26
Thibodeau v. American Baptist Churches of Connecticut, 994 A.2d 212 (Conn. App. 2010), *certification denied*, 3 A.3d 74 (Conn. 2010)..... 15, 25-26

TABLE OF CITED AUTHORITIES—Continued

Page

Trice v. Burress, 137 P.3d 1253 (Ok. App. 2006), *rev. denied* (Ok. June 19, 2006)..... 17
Tubra v. Cooke, et al., 225 P.3d 862 (Or. App. 2010), *rev. denied*, 237 P.3d 221 (Or. 2010) .....*passim*
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871)..... 23-26, 28
Williams v. New Song Community Church, Multnomah County (Oregon) Circuit Court Case #1007-10097..... 32
Yaggie v. Indiana-Kentucky Synod, 860 F.Supp. 1194 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) (table)..... 16, 20

STATUTE, CONSTITUTIONAL PROVISION, AND RULE

28 U.S.C. § 1257(a)..... 2
U.S. Constitution, First Amendment .....*passim*
U.S. Supreme Court Rule 10(c)..... 35

OTHER AUTHORITIES

George Blum, *Defamation of Member of Clergy*, 108 ALR5th 495 (2003)..... 21
Constance Frisby Fain, *Defamation of Church Member by Church or Church Official*, 109 ALR5th 541 (2003) 21
John Gibeaut, "First Amendment Rites – Damaging words cost pastor his pulpit but land him big bucks," *ABA Journal*, June 2010 ..... 12, 32-33

TABLE OF CITED AUTHORITIES—Continued

Page

Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981) 23-25

Chad Olsen, *In the Twenty-First Century's Marketplace of Ideas, Will Religious Speech Continue to be Welcome?: Religious Speech as Grounds for Defamation*, 37 Texas Tech L. Rev. 497 (2005) 12

IN THE

Supreme Court of the United States

No. 10-____

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,

Petitioners,

v.

TIM TUBRA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeals of Oregon.

OPINION AND ORDERS BELOW

The Supreme Court of Oregon's Order Denying Review of the Court of Appeals of Oregon's decision is attached as App. A. (References to "App." are to the attached Appendix.) The court's published opinion in *Tubra v. Cooke, et al.*, 225 P.3d 862 (Or. App. 2010), *rev. denied*, 237 P.3d 221 (Or. 2010), is attached as App. B. The trial court's Order granting petitioners' motion for judgment notwithstanding the verdict ("JNOV") is attached as App. C.

BASIS FOR JURISDICTION

The Supreme Court of Oregon's Order Denying Review of the Court of Appeals of Oregon's decision was entered on July 29, 2010. (App. 1a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The First Amendment to the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. A Case of First Impression for This Court

This is a civil defamation action arising from the termination of respondent Tim Tubra ("plaintiff"), then a Foursquare Church pastor, by the Church acting in accord with Church policy through two of its officials, petitioners John Michael Cooke ("Pastor Cooke") and Ron Swor ("Pastor Swor"). Plaintiff did not directly challenge the Church's termination decision, but instead filed a lawsuit, claiming that he was defamed in the course of the Church's disciplinary process. It is undisputed that all allegedly defamatory statements were made solely within the Church by Church officials and only to Church members, explaining that plaintiff was dismissed because he misappropriated Church money, lied, and was "sowing discord" within the Church. (Third Amended Complaint ("Complaint") (App. D).)

Creating its own new test to decide that the First Amendment was not infringed, the Court of Appeals of Oregon reversed the JNOV for petitioners based on the First Amendment and reinstated the jury verdict for plaintiff.

At its core, this case involves the First Amendment right of a church to exercise its religion, speak to its members, and manage its own affairs, including the discipline of the spiritual leaders it employs, free from intrusion by courts.

As stated in *Tubra*, the issue here is one of first impression for this Court. "No United States Supreme Court case *** specifically addresses the applicability of First Amendment protections to churches and other religious groups defending against allegations of defamation by a church pastor." *Tubra*, 225 P.3d at 869; App. 16a-17a.

This case is about the scope of First Amendment protection for a church and its officials, as well as the related issue of subject matter jurisdiction, and does not involve a dispute about the underlying facts. The Court may assume that plaintiff was defamed.

Because there is no ruling by the Court on the question presented, the First Amendment has been interpreted in conflicting and irreconcilable ways by many state and federal courts in nearly identical fact patterns, as shown below. Moreover, because the freedom of a religious community to select its spiritual leaders must also include the freedom to terminate and discipline them without interference by the State, this case presents a serious and overarching issue of importance for the Court and the entire country.

B. The Underlying Termination Dispute Between a Church and its Pastor

The Foursquare Church is a Christian denomination that traces its founding to the inspired work of Aimee Semple McPherson beginning in Los Angeles in 1923. As a hierarchical church, the Church has approximately 262,000 members organized into 14 districts across the U.S., and more than 64,000 churches and meeting places around the world. Its 1,865 U.S. churches are served by over 6,800 pastors called to ministry by the Church. Pastors profess their allegiance to the "Minister's Code of Ethics" and the Church's bylaws, and are expected to live lives of probity, modesty, and honesty. From 1981 until 2004, plaintiff was one of the Church's pastors.[1]

According to the doctrine and practices of the Church, plaintiff was duly selected and licensed as a pastor, and was assigned to be an Associate Pastor of the Church's congregation in Columbia City, Oregon. Financial difficulties forced Pastor Cooke, a divisional superintendent, to lay plaintiff off in September 2003.[2] However, Pastor Cooke, whose job is to assign prospective pastors to available openings, offered plaintiff a pastorate in Vernonia, Oregon.

---

[1] Background information about the Church can be found on its website, www.foursquare.org.

[2] Plaintiff alleges that Pastor Cooke "was the Senior Pastor at the Columbia City Foursquare Church and directly supervised and directed plaintiff's job duties." (Complaint at ¶ 6; App. 32a.) Plaintiff alleges that Pastor Swor "was the regional superintendent for the Columbia District of the Foursquare Church and directly supervised and directed the job duties of both plaintiff and [Pastor] Cooke." (Complaint at ¶ 7; App. 32a.) "At all material and relevant times, plaintiff and [Pastors] Cooke and Swor were agents of" the Church. (Complaint at ¶ 8; App. 32a.)

Tubra, 225 P.3d at 864; App. 3a. Plaintiff agreed to this assignment. *Tubra*, 225 P.3d at 864; App. 4a.

In April 2004, plaintiff wrote himself a $3,000 check from a Church account, "explaining [to the local church business council] that the money had been earmarked for him as a gift." *Tubra*, 225 P.3d at 865; App. 5a. Later that year, plaintiff was being transitioned out as pastor of the Vernonia congregation, and an internal audit of the books, performed as a matter of routine practice, identified that check and raised questions. *Tubra*, 225 P.3d at 865; App. 6a.

What follows is from plaintiff's Third Amended Complaint filed on the first day of trial (App. D; Trial Transcript ("Tr") 25-27) and his trial testimony, and is undisputed for purposes of this Petition:

On September 15, 2004, while he was working as a Church pastor, plaintiff met with Pastor Swor, who stated that plaintiff was "being charged with misappropriation of church funds." *Tubra*, 225 P.3d at 865; App. 6a; Tr 132-133, 182. An internal audit found that plaintiff had written himself a check for $3,000, which the Church contended was improper. At this meeting, Pastor Swor asked plaintiff what he did with the $3,000 of Church money, and plaintiff admits that he said "I don't know," and that he had "no explanation" at that time for what happened to the money. *Tubra*, 225 P.3d at 865; App. 6a; Tr 133, 182.

Shortly after this meeting, plaintiff received a call from Pastor Swor's secretary telling him that he "was done at Vernonia and that same day to pack [my] bags and leave ***. After they asked me to leave, *** I left." *Tubra*, 225 P.3d at 865; App. 6a; Tr 134. As plaintiff himself noted, "[Pastor] Swor dismissed

plaintiff from his position at the Vernonia Foursquare Church and suspended his pastor's license with the [Church]." (Complaint at ¶ 20; App. 35a.)

Plaintiff thus admits that what happened was a "termination." (Complaint at ¶ 25; App. 37a.)

During this disciplinary process, Pastors Swor and Cooke composed a letter to the Vernonia Church congregation stating the basis for plaintiff's discipline so that speculation over his departure might be avoided. *Tubra*, 225 P.3d at 865; App. 7a. Plaintiff concedes that all allegedly defamatory statements were made solely *within* the Church by Pastors Swor and Cooke only. Specifically, plaintiff alleges that Pastor Cooke "read to the Vernonia congregation a letter, written in conjunction with [Pastor] Swor, in which he falsely accused plaintiff of misappropriating church assets." (Complaint at ¶ 21; App. 36a; App. F.)[3]

Plaintiff cites only one other allegedly defamatory communication. This is an internal Church email from Pastor Cooke to Teresa McGill, "[Pastor] Swor's

---

[3] The letter is also filled with references to plaintiff's employment status, Church governance, and the Lord. It begins "**Greetings in the powerful and unchanging name of Jesus Christ!**" (bolding in original), and states that Pastor Swor "felt it needful for the church membership to be aware" of his findings concerning "a financial misappropriation" by plaintiff, the "former pastor." (App. 48a-50a.) The letter concludes: "Where it is not the intention of the district to harm anyone's personal reputation, it is sometimes important to bring difficult issues to light, so that nothing will hinder the future work of the church. It is our hope that the Lord would bear witness to our testimony, and that the open and gracious disclosure of the truth would allow the church to move on in a spirit of unity and trust." (App. 51a.)

secretary," in which Pastor Cooke told Ms. McGill, who was responding to plaintiff's request for a copy of the letter at issue, that plaintiff had "demonstrated a willingness to lie and steal, and to purposely sew [sic] discord against the division." (Complaint at ¶ 22; App. 36a; App. G.)

Through these communications, plaintiff alleges that petitioners imputed to him an "unfitness" to be a pastor, which "damaged" him "spiritually," and that petitioners defamed him through implying that he was "an enemy of the church." (Complaint at ¶¶ 29, 32, 42, 47, 52; App. 38a-39a, 41a-43a.)

In summary, plaintiff claims that he "was a pastor with the Foursquare Church until [petitioners] forced him to leave the ministry and publicly defamed him *to parishioners* by falsely accusing him of stealing church funds ***." (Complaint at p. 1 (emphasis added); App. 30a.)

Accordingly, petitioners objected to plaintiff's defamation claims on First Amendment grounds, including through an Affirmative Defense in their Answer to the Complaint, but the trial court initially refused to dismiss the claims. *Tubra*, 225 P.3d at 866-867; App. 10a-11a; Tr 25-27.

C. Grant of First Amendment Relief by the Trial Court after Verdict

At trial, Pastor Swor testified that he wrote the letter at issue because "the congregation had a right to know what was happening," and there was "a lot of speculation that we didn't want to take place. So we felt that our responsibility was to go to the congregation, have a specific meeting where we could talk to them about this ***." (Tr 274.) Pastor Cooke testified that the letter was written because congregation

members demanded an explanation of "what happened to their money," and that because of "all the rumors that have been flying around," the Church needed "to come out and address it, have a meeting, write a letter, something before you send another pastor out here." (Tr 394-395.)

Pastor Swor testified that the phrase "sowing discord" that was used in the email at issue is "an ecclesiastical term, a biblical term. To sow discord or false reports." (Tr 276.)

Plaintiff testified that the allegedly defamatory letter was "read from the pulpit" to "the congregation" on October 27, 2004. (Tr 137, 275.) Likewise, the undisputed trial testimony is that on November 30, 2004, Pastor Cooke sent the allegedly defamatory email only to Ms. McGill, Pastor Swor's administrative assistant. (Tr 227, 404-406, 409; App. G.)

At trial, plaintiff only asserted defamation claims. (Complaint at ¶¶ 26-55; App. 37a-44a; Tr 25-27.) The case was allowed to proceed to the jury when the trial court denied petitioners' directed verdict motion based on the First Amendment. *Tubra*, 225 P.3d at 867; App. 10a-11a.

Plaintiff's attorney then stated in his closing argument at trial that this case involves "*Church politics.* *** I want you to be thinking about is there another way [the Church] could've dealt with that issue ***. Could they have done things a little different rather than taking it to the level that they did." (Tr 508-509 (emphasis added).)

The jury then deliberated and awarded plaintiff $200,000 in economic damages for lost income. (Complaint at ¶¶ 31(a), 51(a); App. 38a, 43a, 47a.)

Plaintiff also alleged that petitioners caused him non-economic damages by "denying him the ability and opportunity to pursue his spiritual calling and by calling his moral character into question before the Foursquare Community," and by "making him an object of suspicion in *that* community ***." (Complaint at ¶¶ 31(c)-(d), 51(c)-(d) (emphasis added); App. 39a, 43a.) The jury responded by awarding him $155,000 in non-economic damages. (App. 47a.)[4]

However, the trial court later granted petitioners' JNOV motion based on the First Amendment, holding that "this case is absorbed" in the "employment relationship" between plaintiff and the Church, and "that's what the current cases speak to." *Tubra*, 225 P.3d at 867; App. 11a.

D. Court of Appeals of Oregon Reverses and Rejects First Amendment Defense

The Court of Appeals of Oregon reversed the JNOV for petitioners and reinstated the jury's verdict, holding that the First Amendment did not bar plaintiff's defamation claims. *Tubra*, 225 P.3d at 873; App. 27a. The court reframed petitioners' First Amendment jurisdictional objection to the power of courts to adjudicate claims arising out of the discipline of a church pastor into a question about "absolute privilege" as a defense to defamation claims. *Tubra*, 225 P.3d at 867-868; App. 11a-15a. Viewing the case in that light, the court considered and rejected the approach taken by the majority of courts

---

[4] The jury also found that the "qualified privilege" to plaintiff's defamation claims was abused, an issue on which the jury was instructed to consider the nature of the communications and the purposes of the Church officials who made them. *Tubra*, 225 P.3d at 867 and n. 3; App. 11a.

in other jurisdictions, which, as shown below, hold that the First Amendment bars pastor defamation claims. *Tubra*, 225 P.3d at 871-872; App. 20a-24a.

Instead, the court in *Tubra* found the rights protected under the First Amendment to be narrower, and the court created its own new test for when the First Amendment applies to church discipline cases:

> If the organization is of a religious character, and the alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious, then the statements are *purely religious as a matter of law*, and the Free Exercise Clause bars the plaintiff's claim. In defamation law terms, those statements enjoy an absolute privilege.
>
> If, however, the statements—although made by a religious organization—do not concern the religious beliefs and practices of the religious organization, or are made for *a nonreligious purpose* –that is, if they would not "*always and in every context*" be considered *religious in nature*—then the First Amendment does *not* necessarily prevent adjudication of the defamation claim, but the statements may nonetheless be qualifiedly privileged ***.

Tubra, 225 P.3d at 872 (emphasis added); App. 24a-25a.

The court then held that because the statements here concerning a pastor's honesty and integrity would not "always and in every context" be considered "religious in nature," then they were only subject to a "qualified privilege." *Tubra*, 225 P.3d at

873; App. 25a. The court further held that in its "view, determining whether [petitioners] had reasonable grounds for believing the defamatory statements or whether the statements were made for purposes outside the purpose of the [qualified] privilege can be resolved without requiring the court to delve into the ecclesiastical concerns of the church." *Tubra*, 225 P.3d at 873; App. 27a.

On July 29, 2010, the Supreme Court of Oregon denied petitioners' timely Petition for Review. (App. 1a.)

REASONS FOR GRANTING THE PETITION

A. The Absence of Definitive Guidance by This Court Has Created a Conflict Among the Lower Courts About Whether the First Amendment Bars a Pastor's Defamation Claim Against His Church Arising Out of His Discipline and Termination by The Church.

This case offers the Court the chance to settle a serious conflict of opinion among the state and federal courts of appeals over the scope of First Amendment rights of religious institutions to discipline their own clergy without having those decisions second-guessed by secular courts through the vehicle of defamation claims.

As shown herein, many jurisdictions have offered divergent and irreconcilable opinions on the issue of institutional religious freedom before the Court. "With so many federal and state courts weighing in on the issue, it is no surprise that a split of authority has developed." *Calvary Christian School, Inc. v. Huffstuttler*, 238 S.W.3d 58, 64 (Ark. 2006).

This split of lower court authority on an important issue of federal constitutional law that this Court has never decided makes this case appropriate for review. *See also* John Gibeaut, "First Amendment Rites – Damaging words cost pastor his pulpit but land him big bucks," *ABA Journal*, June 2010, at p. 19 (discussing *Tubra* and stating that the "Oregon judges also appeared to go out of their way to invite U.S. Supreme Court review" by expressly recognizing that no U.S. Supreme Court case addresses the specific issue before the Court).

"Another problem for religious speech in defamation suits *** is that states have great discretion in establishing their own rules for liability in defamation suits, permitting inconsistent standards for the constitutional protection of religious speech." Chad Olsen, *In the Twenty-First Century's Marketplace of Ideas, Will Religious Speech Continue to be Welcome?: Religious Speech as Grounds for Defamation*, 37 Texas Tech L. Rev. 497, 527 (2005). "Many lower courts have taken a number of different approaches to resolving church controversies, and, consequently, they have rendered the jurisprudence surrounding the Free Exercise and Establishment Clause unpredictable for Americans concerned about religious freedom." *Id.* at 520.

Therefore, this petition should be granted because whether the U.S. Constitution bars a pastor's claims against his own Church should not depend on the jurisdiction where the lawsuit is filed. This case presents the Court with the opportunity to settle this issue of first impression and provide a uniform First Amendment analysis applicable to all jurisdictions.

Here, the Oregon court extended a conflict among the courts of last resort in the states and wrote a new rule that conflicts with the First Amendment, the relevant decisions of this Court, and the majority of lower courts, which hold that the First Amendment bars pastor defamation claims. *See Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 517 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002) ("most courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that question in the affirmative").

The Virginia Supreme Court's decision in *Cha* confirms the constitutional difficulty with allowing pastor defamation claims against churches to proceed in secular courts. In *Cha*, the plaintiff pastor alleged that he was defamed and wrongfully terminated after being falsely accused by a church deacon of "the misuse of Church funds" ($100,000), much like plaintiff here. *Id.* at 512-513. The court held that "it lacked subject matter jurisdiction to review the plaintiff's claims against the [church]." *Id.* at 515.

Like plaintiff here, Pastor Cha alleged that the defamatory statements impugned "his honesty and integrity, values which are essential in his success as a pastor." *Id.* at 516. However, in contrast to the Court of Appeals of Oregon, the Virginia Supreme Court held that

> plaintiff's allegations of defamation against the individual defendants *cannot be considered in isolation, separate and apart from the church's decision to terminate his employment.* *** [I]f a civil court were to exercise jurisdiction of the plaintiff's [lawsuit] under these circumstances,

> the court would be compelled to consider the church's doctrine and beliefs because such matters would undoubtedly affect the plaintiff's fitness to perform pastoral duties and whether the plaintiff had been prejudiced in his profession. Neither the Free Exercise Clause nor [the] Constitution of Virginia permits a civil court to undertake such a role.

Id. at 516-517 (emphasis added).[5] *See also Heard v. Johnson*, 810 A.2d 871, 883 (D.C. 2002) (stating that under "most circumstances, defamation is one of those common law claims that is not compelling enough to overcome First Amendment protection surrounding a church's choice of pastoral leader," and dismissing the plaintiff pastor's defamation claim).[6]

---

[5] Just as in *Cha*, plaintiff here alleges that he was damaged by petitioners imputing to him an "unfitness" and "lack of integrity to perform his duties as a Foursquare pastor, and by prejudicing plaintiff in his pursuit of that chosen profession." (Complaint at ¶ 29; App. 38a.) *See also Patton v. Jones*, 212 S.W.3d 541, 555 (Tex. App. 2006), *rev. denied* (Tex. January 12, 2007) (dismissing the plaintiff's defamation claim because the statements were "based on the Church's perception that he was unfit" to serve as its Director of Youth Ministries).

[6] In contrast with *Tubra's* test, the court in *Heard* held that the "constitutional protections afforded by the Free Exercise clause (prohibiting civil court interference in disputes between ministers and churches) extend to defamation claims, when: (1) such a claim flows entirely from an employment dispute between a church and its pastor so that consideration of the claim in isolation from the church's decision as to the pastor is not practical, (2) the alleged 'publication' is confined within the church, and (3) there are no unusual or egregious circumstances." *Heard*, 810 A.2d at 885. *See also* n. 12, *infra* (discussing another First Amendment test from Pennsylvania applicable to defamation claims against religious institutions).

This is the holding of many other jurisdictions that dismiss clergy defamation claims, and many of these cases were recently decided. *Thibodeau v. American Baptist Churches of Connecticut*, 994 A.2d 212, 222 (Conn. App. 2010), *certification denied*, 3 A.3d 74 (Conn. 2010) (pastor's defamation claim concerned "letters published by members of the defendant [church] *within* the church community containing allegedly false statements about the plaintiff with respect to his fitness for ministry. This claim arises out of the defendant's relationship with the plaintiff, and its resolution would require an impermissible inquiry into the defendant's bases for its action and its ground for evaluating ministers.") (emphasis added); *Stepek v. Doe*, 910 N.E.2d 655 (Ill. App. 2009), *appeal denied*, 919 N.E.2d 366 (Ill. 2009) (priest accused of sexually abusing minors); *Reynolds v. Wood*, 998 So.2d 1058, 1059-1060 (Ala. App. 2007), *rev. denied* (Ala. June 20, 2008) (dismissing a deacon's defamation claim based on statements a pastor made about him during a sermon, holding that "courts may not decide the truth or falsity of such statements and, therefore, may not entertain claims pertaining to those issues. Furthermore, as a matter of policy, we have strong reservations about restricting the religious speech of a pastor from his pulpit.");[7] *Seefried v. Hummel*, 148 P.3d 184, 190 (Colo. App. 2005), *rev. denied*, 2006 WL 2590062 (Colo. 2006) (dismissing the plaintiff's defamation claim because "the statements at issue were made in the context of a meeting convened by the church and its board for church members to discuss whether Richard Seefried

---

[7] Like the plaintiff in *Reynolds*, plaintiff here admits that the allegedly defamatory letter was "read from the pulpit" to "the congregation." (Tr 137, 275; App. F.)

should be terminated as pastor.");[8] *Ogle v. Church of God*, 153 Fed. Appx. 371 (6th Cir. 2005) (bishop); *Bourne v. Center on Children*, 838 A.2d 371 (Md. App. 2003), *rev. denied*, 846 A.2d 401 (Md. 2004) (pastor); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002) (priest's defamation claim concerned being called a "liar" by his leaders); *Jacobs v. Mallard Creek Presbyterian Church*, 214 F.Supp.2d 552 (W.D. N.C. 2002) (minister); *Jackson v. Presbytery of Susquehanna Valley*, 697 N.Y.S.2d 26 (N.Y. App. 1999) (defamatory statements reflected "adversely upon [the plaintiff's] fitness to continue serving as a minister"); *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. App. 1998) (rabbi sued for defamation based on a written statement by a temple official that he had committed a crime by physically striking another rabbi); *Jeambey v. The Synod of Lakes and Prairies*, 1995 WL 619814 (Minn. App. 1995) (dismissing the plaintiff minister's defamation claim based on statements in the defendant church's newspaper that plaintiff engaged in "sexual misconduct"); *Yaggie v. Indiana-Kentucky Synod*, 860 F.Supp. 1194 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) (table) (pastor sued his church for defamation concerning a bishop's statement that the plaintiff needed "psychiatric treatment" and "resigned" his position, but the court held that the First Amendment barred plaintiff's claim); *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. App. 1989), *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S.

---

[8] Just like in *Seefried*, Pastor Swor testified that he wrote the allegedly defamatory letter because "the congregation had a right to know what was happening," and "we felt that our responsibility was to go to the congregation [and] have a specific meeting where we could talk to them about this ***." (Tr 274.)

1080 (1990) (dismissing a priest's defamation claim against a bishop relating to statements about sexual misconduct); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986) (minister).[9]

The application of the First Amendment in these jurisdictions is robust, broadly protecting religious institutions even when church members seek damages for statements made within the context of church discipline. *In re Godwin*, 293 S.W.3d 742, 746-749 (Tex. App. 2009) (court did not have jurisdiction over a defamation claim by a church member against a church and its pastor based on a written statement the pastor "read to the congregation from the pulpit" accusing the plaintiff of attempting to bribe other church members because the statement "was directed to church governance and maintaining harmony within the congregation");[10] *Brady v. Pace*,

---

[9] Identical results occur even with non-clergy church employees. *Trice v. Burress*, 137 P.3d 1253 (Ok. App. 2006), *rev. denied* (Ok. June 19, 2006) (Youth Director); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*, 714 N.E.2d 253, 261-263 (Ind. App. 1999) (the plaintiff was terminated as Director of Religious Education for a Catholic parish, and the defendant pastor stated that plaintiff "cannot be trusted with seven-year-old children"). The court in *Trice* also rejected the argument that the First Amendment defense no longer applies when a defamatory statement is made after a church employee is terminated because examination of the statement still "requires an impermissible inquiry into Church disciplinary matters, barred by the First Amendment." *Trice*, 137 P.3d at 1258-1259. *See also Seefried*, 148 P.3d at 190-191 (reaching the same holding as to a pastor's defamation claim based on post-termination statements).

[10] Much like in *Godwin*, plaintiff here admits that the allegedly defamatory letter was "read from the pulpit" to "the congregation," and the letter states that it was intended to "allow the church to move on in a spirit of unity and trust." (Tr 137, 275; App. 51a.)

108 S.W.3d 54, 55-60 (Mo. App. 2003) (church member's defamation claim against church pastors barred where the defendants stated, like Pastor Cooke here, that the plaintiff was "sowing discord" within the church; the court affirmed the JNOV for defendants, holding that the court was "without jurisdiction" because the "libelous remarks are clearly related to Defendants' belief that [plaintiff's] conduct within the church required he be disciplined," and "the remarks were made to people associated with the Church" and thus "fall within the scope of First Amendment protection."); *Schoenhals v. Mains*, 504 N.W.2d 233, 234-236 (Minn. App. 1993) (court dismissed church members' claim for defamation based on a letter a pastor wrote and "read to the entire congregation" stating that the plaintiffs were expelled from the church because of their desire "to consistently create division" and due to plaintiffs "lying").

These jurisdictions interpret and apply the First Amendment broadly to protect, not narrow or "purely" religious questions (as determined by secular courts), but the entire church disciplinary process itself from being second-guessed by courts. They recognize that just because an allegedly defamatory statement sounds secular in nature when viewed in isolation does not mean that it is "nonreligious." As explained in *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. App. 1996), where the court, pursuant to the First Amendment, dismissed a priest's defamation claim concerning his "honesty" being questioned,

> [q]uestions of truth, falsity, malice, and the various privileges that exist often take on a different hue when examined in the light of religious

> precepts and procedures that generally permeate controversies over who is fit to represent and speak for the church. *** The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern.

Id. at 812-813 (citation and internal quotations omitted).

For this reason, the courts in the majority of jurisdictions bar tort claims by pastors against their own religious communities, finding that, in context, even simple words like "honesty" and "fitness" relate to religious beliefs and to the expectations of church leaders and congregants about their leaders. As further shown below, such matters cannot be second-guessed by secular courts without trampling the rights of religious communities protected by the First Amendment.

The cases above contrast with the decisions in *Tubra* and in other jurisdictions, which draw a different, and we submit incorrect, line for First Amendment purposes. The court in *Tubra* cited and rejected *Heard*, *supra*, and its three-part test, and instead found guidance in *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993). *Tubra*, 225 P.3d at 871-872 and n. 10; App. 21a-25a. In *Marshall*, a minister discharged over allegations of sexual impropriety sued for defamation because his congregation recited the reasons for his discharge to a prospective congregation. The court believed the claim could be resolved without delving into "religious" questions because, unlike the present case, the claim did not require the court to judge plaintiff's "qualifications" as a pastor. *Marshall*, 845 P.2d at 428. The area circumscribed

by the First Amendment in Alaska in a case like this one is thus much smaller than in the majority of other cases.[11]

A few other jurisdictions follow this approach. *See Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1103 (Pa. 2009) (defamation claim brought by a student expelled from a Catholic school permitted);[12]

---

[11] *Marshall* has been rejected by other courts. *See Yaggie*, *supra*, 860 F.Supp. at 1198-1199 (the court held that *Marshall* was distinguishable because *Marshall* "found that the dispute did not concern plaintiff's qualifications as a pastor," and the court chose "not to follow the *Marshall* rationale" because "we cannot allow it to outweigh the substantial federal authority holding to the contrary;" the court further held that "all matters" concerning "the interaction between a church and its pastor" are "of ecclesiastical concern. It makes no difference that the ecclesiastical dispute fails to touch on church or religious doctrine," and acknowledged that "the alleged defamatory statements do not express any religious principles or beliefs. However, the fact remains that this action is the result of a conflict confined within the Resurrection Lutheran Church, concerning the employment relationship of its minister").

[12] Reversing the dismissal of the claim, the court in *Connor* held that "in determining whether to apply the deference rule, the fact-finding court must: (1) examine the elements of each of the plaintiff's claims; (2) identify any defenses forwarded by the defendant; and (3) determine whether it is reasonably likely that, at trial, the fact-finder would ultimately be able to consider whether the parties carried their respective burdens as to every element of each of the plaintiff's claims without 'intruding into the sacred precincts.'" *Connor*, 975 A.2d at 1103 (citation omitted). The new three-part "sacred precincts" test from *Connor*, along with the tests from *Heard* and *Tubra* (which cited and rejected *Heard's* test), means that two different states (and D.C.) have three different three-part tests for determining whether the federal constitution bars defamation claims by clergy and religious institution members. The Court should accept review to resolve this conflict.

Calvary Christian School, *supra*, 238 S.W.3d 58 (the First Amendment did not bar a defamation claim brought by a student expelled by a Christian school); *House of God v. White*, 792 So.2d 491 (Fla. App. 2001) (the plaintiff church member's defamation claim against the defendant pastor held not barred by the First Amendment); *Drevlow v. Lutheran Church*, 991 F.2d 468, 469-472 (8th Cir. 1993) (the First Amendment did not bar the plaintiff minister's libel claim because "we are unable to predict that the evidence offered at trial will definitely involve the district court in an impermissible inquiry" into the defendant's religious beliefs).[13]

Therefore, courts in the various states and federal circuits interpret the same First Amendment text very differently, formulating their own different tests and allowing for varied protections. Lower courts are construing this Court's First Amendment decisions in conflicting ways concerning whether churches can be held liable for statements made solely to congregants in the course of intra-church discipline. Thus, a national denomination like the Foursquare Church enjoys First Amendment protection for the discipline of its pastors in Virginia and Colorado, but not in Oregon or Alaska. The proper resolution of the meaning of the First Amendment's text is for the

---

[13] Many more cases reflecting the split of lower court authority on the issue of first impression before the Court are summarized in the secondary legal literature. *See* George Blum, *Defamation of Member of Clergy*, 108 ALR5th 495 (2003); Constance Frisby Fain, *Defamation of Church Member by Church or Church Official*, 109 ALR5th 541 (2003).

Court to accept review of this issue of first impression and settle this conflict.[14]

B. The Decision Below Conflicts With Decisions of this Court and Signals a Need for this Court to Protect the Rights of Religious Institutions.

"This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is to prevent, as far as possible, the intrusion of either the church or the state into the precincts of the other." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (citation, quotations, and brackets omitted).

---

[14] This case is also appropriate for review because the facts relating to why the First Amendment bars plaintiff's defamation claims are undisputed. This Court and Oregon's courts hold that the allegations in the operative Complaint must show that subject matter jurisdiction exists. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936); *Dippold v. Cathlamet Timber Co.*, 193 P. 909, 911-913 (Or. 1920). Taking plaintiff's own allegations as true, all defamatory statements were made by Church officials solely within the Church, and they all relate to why the Church disciplined plaintiff, which shows that courts lack subject matter jurisdiction over his claims. *See* App. D; *Heard*, 810 A.2d at 885; *Cha*, 553 S.E.2d at 517. The Court can also assume that plaintiff *was* defamed as found by the jury, and the undisputed evidence at trial summarized in *Tubra* also establishes that the First Amendment bars plaintiff's claims. *See Heard*, 810 A.2d at 877 (a church's immunity under the First Amendment "is purely a question of law" that is "separate from the merits of [a pastor's] defamation claim"); *Brady*, *supra*, 108 S.W.3d at 55-60 (affirming the JNOV for the defendant pastors against a church member's defamation claim based on the statement that the plaintiff was "sowing discord" within the church).

This linchpin principle is being eroded and will continue to erode without clear guidance from this Court. The writ should thus be granted to clarify and protect this important principle of federal constitutional law.

This Court in *Watson v. Jones* held:

> All who unite themselves to such a [religious] body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.

Watson v. Jones, 80 U.S. (13 Wall.) 679, 729 (1871).

"Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. *** [T]hese organizations must be protected by the Free Exercise Clause.'" *Corp. of The Presiding Bishop of The Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341-342 (1987) (Brennan, J., concurring) (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)). An "organization's claim to autonomy is strongest with respect to internal affairs, including relationships between the organization and all persons who have voluntarily joined it. The voluntary nature of religious activity has played a prominent role in church autonomy cases from the

beginning." Laycock, 81 Colum. L. Rev. at 1403 (citing *Watson*).

What *Watson* forbids is what the Oregon court has allowed here. Plaintiff chose to work as a pastor for the Church. He was not an employee of a government agency or secular business, for example. By choosing Church work, he agreed to comply with the standards of the Church and to accept its internal disciplinary decisions. *See Higgins*, *supra*, 258 Cal. Rptr. at 759-761 (pursuant to the First Amendment, dismissing a priest's defamation claim against a bishop arising from accusations of assault and "dangerous tendencies," holding that "secular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy. Implicit in this statement of the rule is the acknowledgement that such wrongs may exist, that they may be severe, and that the administration of the church itself may be inadequate to provide a remedy. The preservation of the free exercise of religion is deemed so important a principle as to overshadow the inequities which may result from its liberal application. In our society, jealous as it is of separation of church and state, one who enters the clergy forfeits the protection of the civil authorities in terms of job rights;" the court also held that if "civil courts enter upon disputes between bishops and priests because of allegations of defamation," then "it is difficult to conceive the termination case which could not result in a sustainable lawsuit."); *see also* Laycock, 81 Colum. L. Rev. at 1409 and n. 269 ("When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member. *** Of course there will be disputes between churches and their employees. But such

disputes should be resolved internally, without government interference.").

The Church determined that plaintiff misappropriated Church money and should be terminated, and that he was "sowing discord" within the Church. All of the allegedly defamatory statements were made by Church pastors solely *within* the Church and only to other church members. Plaintiff was not defamed in public through the media.[15]

Also, it is undisputed that the statements at issue all related to plaintiff's conduct "during his time as pastor." *Tubra*, 225 P.3d at 864; App. 3a.

Tubra thus attacks the *Watson* foundation on which churches rely: That they will be free from government intrusion into wholly intra-church disciplinary matters, especially concerning the conduct of their pastors, whose mission is to speak for the church. Plaintiff did not like the result of the Church's internal disciplinary decision, so he appealed to the secular courts for money damages.

Under *Watson*, plaintiff's defamation claims should be barred because secular courts lack subject matter jurisdiction over such claims by a pastor against a church. Indeed, in the *Cha*, *Heard*, *Bourne*, *Thibo-*

---

[15] *Cf. Hayden v. Schulte*, 701 So.2d 1354, 1356-1357 (La. App. 1997), *writ denied*, 709 So.2d 737 (La. 1998) ("It is one thing to say that churches must be free of governmental interference to conduct matters of *internal* discipline and organization, even when those matters touch upon the reputations of those effected [sic]. It is quite another to say that churches have the unfettered right to make unsubstantiated statements of an essentially secular nature *to the media* destructive of a priest's character as we read Father Hayden's [defamation] petition alleges occurred in this case.") (emphasis added).

deau, *Stepek*, *Hiles*, *Downs*, *Ogle*, *Hutchison*, and *Patton* decisions cited above, the courts all cite *Watson* to support their holdings that the defamation claims are barred. *See also Jacobs*, 214 F.Supp.2d at 557 (dismissing the plaintiff's defamation claim, citing *Watson* and holding that "in accepting the position of Senior Pastor," plaintiff "yielded to the jurisdiction of the church").

Likewise, the decision below conflicts with *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). There, this Court held that there is "no dispute that questions of *church discipline* and the composition of a church hierarchy are at the core of ecclesiastic concern," and that the First Amendment permits "hierarchical religious organizations to establish their own rules and regulations for internal discipline and government ***. [T]he Constitution requires that civil courts accept their decisions as *binding* upon them." *Id.* at 717, 724-725 (emphasis added).

Plaintiff admits that this case involves the discipline of a Church pastor and the composition of the Church's hierarchy. He alleges that Pastor Swor falsely accused him of misappropriating Church assets, and then "dismissed plaintiff from his position," which was a "termination," and suspended his pastor's license. (Complaint at ¶¶ 20, 25; App. 35a, 37a.)

The Oregon court here drew its lines based on its reading of property dispute cases like *Jones v. Wolf*, 443 U.S. 595 (1979), in which this Court has permitted the states to apply "neutral principles of law" to decide which faction of a church owns property. *Tubra*, 225 P.3d at 869; App. 16a. Also, *Wolf* requires resort to religious documents for proof,

and deference to the religious body is mandatory whenever a "neutral principles" review becomes entangled in religious meaning. *Wolf*, 443 U.S. at 603-604.

The *Wolf* rule in property cases thus could not apply to allow the courts to police other disputes between pastors and their churches, no matter how the disputes are framed. *See Olson v. Luther Memorial Church*, 1996 WL 70102 at *1-*3 (Minn. App. 1996) (dismissing the plaintiff pastor's defamation claim based on the First Amendment and holding that "[n]eutral principles of law analysis is inappropriate in this case because it does not involve a church property dispute").

Moreover, this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), not mentioned by the court in *Tubra*, conflicts with the result in *Tubra*. In *Smith*, in the course of holding that a criminal statute did not violate the First Amendment, the Court relied on the fact that the case concerned "a free exercise claim *unconnected with any communicative activity*," and that there was "no contention that Oregon's drug law represents an attempt to regulate *** the communication of religious beliefs ***." *Id.* at 882 (emphasis added). In contrast with *Smith*, this case does involve the communication by petitioners of their belief that plaintiff was "sowing discord" within the Church, and the communication to Church members of the reasons why the Church disciplined their pastor.

Also, *Smith* only involved "individual" rights. *Id.* at 876, 878-879. The present case, however, involves important issues of institutional autonomy, including a church's ability to discipline its own pastors as it sees fit; its relationship with the persons it employs

to carry out its religious mission; and its right to speak to its own members solely within the church about its pastors in the manner that it sees fit without fear of liability in secular court. As confirmed in *Smith*, *id.* at 877, this Court's decisions recognize that First Amendment protections extend not only to matters of faith, but also to "church administration" and to "the operation of *** churches." *Milivojevich*, 426 U.S. at 710; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952).

Thus, not only does the decision below conflict with protections afforded by this Court for a church to discipline its clergy free from interference by courts, it also infringes on the Church's rights of free speech and freedom of association separately protected by the First Amendment.

Doctrinally, *Tubra* confirms a drift in the First Amendment jurisprudence of the state and federal courts. A robust interpretation of the First Amendment in favor of the rights of religious institutions as exhibited in *Watson* and *Milivojevich* is being undermined by lower courts reading into cases from this Court that implicate different issues (like title to property). Lower courts are allowing greater leeway for the regulation of individual conduct by holding that the First Amendment *only* protects that which is, in the words of *Tubra*, "always and in every context *** religious."

Tubra thus ignores the religious employment context of an allegedly defamatory statement. Plaintiff admits that this case arises from the "termination" of a Church pastor, whose former congregation was informed of the grounds for the termination. (Complaint at ¶¶ 20-21, 25; App. 35a-37a.) The religious employment context of allegedly defamatory

statements is cited as a key reason why the majority of courts bar clergy defamation claims. *Heard,* 810 A.2d at 884 (noting that in the majority of cases, "the alleged defamatory statements did not overtly express any religious principles or beliefs, but all the actions resulted from conflicts 'confined within' the churches involved," and that "the courts found that it was impossible to consider the plaintiffs' allegations of defamation in isolation, separate and apart from the church[s'] decision to terminate [the pastors'] employment.") (citations omitted).

On its face, *Tubra's* new test improperly involves secular courts in issues of internal church discipline and governance. For example, the jury in *Tubra* separately found that petitioners abused the qualified privilege applicable to the statements at issue. (App. 46a.) However, the process of resolving the qualified privilege also violates the Church's First Amendment rights. As noted in other cases, if the Church and its pastors

> were to raise a qualified, or "conditional," privilege defense, the court would be forced to determine whether [petitioners] were acting in good faith or with malice. Resolution of this issue would require assessment, at a minimum, of the motives of the church members who uttered the allegedly defamatory statements. Such a determination could not occur without a subjective evaluation of their choice of spiritual leader.

Seefried, supra, 148 P.3d at 191 (citation omitted).

The Oregon court below entertains the hope that courts will be able to draw a line in a way that avoids infringement of constitutional rights, forgetting the holding of this Court that "the very process of

inquiry" violates First Amendment rights. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). *See also Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F.Supp. 1286, 1287-1290 (D. Minn. 1993) (the plaintiff was a church pastor responsible for maintaining church financial records and sued for defamation after he was terminated, but the court granted the defendant church's summary judgment motion, holding that "the very process of inquiry" into a church's reasons for its actions violates the First Amendment, and that resolution of plaintiff's "defamation claim would require the court to review [the church's] bases for terminating him, an ecclesiastical concern, and the veracity of [its] statements. The court determines that such an inquiry would implicate the concerns expressed in the First Amendment.") (citation omitted).

Therefore, to avoid entanglement in church governance, "the very process of inquiry" forbidden by this Court, this case should have been dismissed by the trial court based on plaintiff's own allegations *before* the jury rendered a verdict. Plaintiff's allegations in his operative Complaint fail to meet his burden to establish that a secular court has subject matter jurisdiction over his claims arising from church discipline. *See McNutt*, 298 U.S. at 189; *Dippold*, 193 P. at 911-913. Instead, Oregon's courts have improperly assumed for themselves the impermissible task of judging what is and is not a "religious purpose" and whether a statement is or is not "purely religious." *See Tubra*, 225 P.3d at 872; App. 24a-25a.

Courts are untrained in a particular religion's customs and practices and cannot, in a wholly secular manner, decide whether a statement is "religious in nature" or has a "purely religious" purpose. *See*

Seefried, 148 P.3d at 190-191 (it "does not matter whether, as plaintiffs allege, the offending statements were secular in nature" because they "related directly to a church process that resulted in Richard Seefried's termination as pastor. Accordingly, evaluation of the statements in isolation of this process, with respect to any of [the] claims here, is not possible.").

To allow a secular jury to decide such issues of "Church politics" (as plaintiff's attorney characterized the dispute to the jury), discipline, as well as a pastor's "fitness" and "integrity" (Complaint at ¶ 29; App. 38a), makes secular courts the arbiter of internal church disputes that are not their province. *See State ex rel Gaydos v. Blaeuer*, 81 S.W.3d 186, 196-198 (Mo. App. 2002) (dismissing a defamation claim by a Catholic school principal based on the defendant religious officials accusing her of having an affair with a priest because a court cannot sit "in judgment" on the "politics" of a church, but allowing another defamation claim to proceed because the remark was "published to a third person" outside the church and was "not connected" to her conduct as an employee).

Juries are not entitled to decide whether what was said by church officials solely within their church about why a pastor was disciplined is defamatory, or whether such a statement was made for a solely "religious purpose" or not. "When a defamation claim arises entirely out of a church's relationship with its pastor, the claim is almost always deemed to be beyond the reach of civil courts because resolution of the claim would require an impermissible inquiry into the church's bases for its action." *Heard*, *supra*, 810 A.2d at 883.

Finally, by resolving conflicts about the proper interpretation of its First Amendment jurisprudence, this Court would solve two other problems. First, the *Tubra* decision is already encouraging the filing of new clergy defamation cases against churches in Oregon, and, as shown herein, clergy defamation claims against churches are increasing nationwide. "Accusations of misconduct, discussions of [a pastor's] misconduct within the church, and the emotional distress and exaggerated language that accompany such activities seem to us to be unavoidable parts of the difficult process by which dissatisfied churches end employment relationships with their pastors." *Id.* at 887.

There is thus a national interest in clarifying the federal constitutional standards that apply to tort claims by pastors and other church employees against the churches and other religious organizations that employ them. The refusal to decide the question presented here will only add to the proliferation of cases exploiting the split of opinion. *See Meyer v. The Episcopal Diocese of Oregon*, Multnomah County (Oregon) Circuit Court Case #1003-03934 (priest defamation lawsuit filed after *Tubra* was decided); *Williams v. New Song Community Church*, Multnomah County (Oregon) Circuit Court Case #1007-10097 (pastor defamation lawsuit filed after *Tubra* was decided); *see also* Gibeaut, *ABA Journal*, June 2010, at p. 19 (Professor Steven K. Green, Director of The Center for Religion, Law and Democracy at Willamette University College of Law, stating that the court in *Tubra* "even acknowledged that they were pushing the envelope," and noting that "Green and other observers predict that the initial victory in Oregon will encourage others.

'I think it has the potential, certainly, of emboldening plaintiff lawyers—and surely clergy—to invite the courts to take another look,' Green says.").

Second, and coupled with increased litigation of these kinds of cases, the refusal to resolve the question here chills the rights of faith communities to take disciplinary action if church leaders refrain from action because they fear getting sued if their conduct is not deemed "purely religious," as *Tubra* requires. On this issue, Justice Brennan's concurring opinion in *Amos*, *supra*, is again instructive:

> What makes the application of a religious-secular distinction difficult is that *the character of an activity is not self-evident*. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. *This results in considerable ongoing government entanglement in religious affairs.* Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition *would be shaped in part by the prospects of litigation*.

Amos, 483 U.S. at 343-344 (citation omitted; emphasis added).

The effect of the *Tubra* decision is to coerce churches and other religious organizations to tailor their methods and restrict their activities and statements to satisfy the State. That result is expressly forbidden by the First Amendment.

The decision below perpetuates a conflict with the decisions of this Court. For more than a century, the Court has made plain that the State cannot second-guess the internal governance and disciplinary decisions of religious communities. Allowing secular juries to award damages because of how language was used, not in the general society, but entirely within the Church by Church leaders speaking only to Church members about the discipline of their pastor, is contrary to those bedrock constitutional principles as interpreted by this Court.

Allowing the ruling below to stand will also encourage other courts to limit the constitutional rights of religious bodies. This limitation can occur directly through the tort system effectively "taxing" the disciplinary structure of any religious body that a secular jury thinks was not acting in a "purely religious" manner. The growth of this kind of litigation will also result in chilling the freedom of all religious bodies to act according to their doctrine solely within the four walls of their congregation.

The Oregon court's decision below significantly undermines the overarching principles embodied in the First Amendment. This is why petitioners' writ should be granted and the Court should resolve the issue of first impression concerning the First Amendment presented by this case.

CONCLUSION

For the foregoing reasons, and pursuant to U.S. Supreme Court Rule 10(c), the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK E. CHOPKO
STRADLEY RONON STEVENS & YOUNG, LLP
1250 Connecticut Ave., N.W.
Suite 500
Washington, DC 20036
(202) 822-9611
mchopko@stradley.com

JOHN T. KAEMPF
Counsel of Record
BROOKSBY KAEMPF PC
121 S.W. Morrison Street
Suite 1100
Portland, OR 97204
(503) 295-7755
jkaempf@brooksbykaempf.com

Counsel for Petitioners

October 22, 2010

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: Supreme Court of Oregon's Order Denying Review	1a
APPENDIX B: Court of Appeals of Oregon's Published Opinion	2a
APPENDIX C: Trial Court's Order Granting JNOV Motion	28a
APPENDIX D: Plaintiff's Third Amended Complaint	30a
APPENDIX E: Verdict	46a
APPENDIX F: Pastor Swor's Letter	48a
APPENDIX G: Pastor Cooke's Email	52a

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF OREGON

Court of Appeals
A134332
S058236

TIM TUBRA, an individual,
Plaintiff-Appellant,
Respondent on Review,

v.

JOHN MICHAEL COOKE and RON SWOR, individuals; and THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California nonprofit corporation,
Defendants-Respondents,
Petitioners on Review.

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

July 29, 2010
DATE

/s/ W. Michael Gillette
PRESIDING JUSTICE

c: John Kaempf
Shay S. Scott

APPENDIX B

COURT OF APPEALS OF OREGON

---

225 P.3d 862

050910015; A134332.

TIM TUBRA, an individual,
Plaintiff-Appellant,

v.

JOHN MICHAEL COOKE and RON SWOR, individuals; and the INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California nonprofit corporation,
Defendants-Respondents.

Argued and Submitted on August 8, 2008.
Decided January 27, 2010.

---

[863] Before WOLLHEIM, Presiding Judge, and ARMSTRONG, Judge, and RIGGS, Senior Judge.

ARMSTRONG, J.

This case arises from a defamation claim that plaintiff, a former interim pastor, brought against his employer church and two of its officials, and that ultimately resulted in a jury verdict and award of damages in plaintiff's favor. Plaintiff appeals the subsequent post-verdict judgment granting defendants' motion for judgment notwithstanding the verdict (JNOV), in which the trial court concluded that the Free Exercise Clause of the First Amendment to the United States Con-[864]stitution deprived it of jurisdiction to adjudicate the dispute. The issue

on appeal is one of first impression for Oregon appellate courts: whether the First Amendment bars recovery for a plaintiff in a claim of defamation that arose from defendants' statements that plaintiff had misappropriated church funds and was dishonest during his time as pastor. We conclude that, under the circumstances presented here, the First Amendment does not bar plaintiff's claim. Accordingly, we reverse.

When reviewing a grant of a JNOV motion, we review the trial evidence in the light most favorable to the party who prevailed before the jury. *Bennett v. Farmers Ins. Co.*, 332 Or. 138, 147-48, 26 P.3d 785 (2001). In this case, that is plaintiff. We state the facts in accordance with that standard.

Plaintiff had been a pastor for various congregations within the International Church of the Foursquare Gospel (the church) since 1981. As of 2003, he was the associate pastor at the Columbia City Foursquare Church, where defendant Cooke was a senior pastor. Cooke also served as a divisional superintendent, which required him to match prospective pastors with vacancies in congregations within his district.

In September 2003, the Columbia City church was experiencing financial difficulties and, as a result, Cooke laid off plaintiff. Cooke offered plaintiff a position as pastor in Vernonia, which was roughly a one-hour drive from Columbia City. Plaintiff was unenthusiastic about the prospective position in Vernonia and explained to Cooke that he had concerns about the salary, health insurance coverage, and lack of opportunities to supplement his income in such a small town. Moreover, plaintiff told Cooke that taking the position in Vernonia would sidetrack him

from his long-expressed goal of founding a Four-square church in Hillsboro.

Despite plaintiff's misgivings, Cooke and defendant Swor, the district supervisor, continued to discuss the opportunity at Vernonia with plaintiff. They offered him a monthly salary of $1,500, which was the amount that the Vernonia church council indicated that it could afford to pay plaintiff; a subsidy of an additional $1,100 per month for plaintiff's first three months (totaling $3,300) to match the salary that the outgoing pastor had received; and health care coverage for up to six months. Swor and Cooke indicated that the health insurance coverage and salary subsidies were "free gifts" that plaintiff had no obligation to repay; they also indicated to plaintiff, orally, that beyond the six-month promise of health insurance coverage, they "would not leave him uncovered" for health benefits if the Vernonia church could not pick up that expense.

Plaintiff eventually accepted the position, but emphasized to Cooke and Swor that he wished to be considered an interim pastor at Vernonia. Plaintiff stated that Cooke had encouraged him to approach the position on a "rent-to-own" basis and speculated that perhaps plaintiff would change his mind about staying permanently once he arrived there. Plaintiff agreed to keep an "open mind" about the situation but continued to assert to Swor and Cooke that he was taking the position on an "interim" basis.

From his first day at the Vernonia church, plaintiff felt that "some deception was taking place" toward the Vernonia church's council and congregation by Cooke and Swor regarding plaintiff's interim status. For plaintiff's first service, Cooke sent a letter of introduction to be read to the congregation by one

of the Vernonia council members announcing "the appointment of [plaintiff] as the pastor of the Vernonia Foursquare Church." That introduction "shocked" plaintiff and his wife; they had never been introduced to a new congregation with such a letter, and they both believed that the letter misled the congregation into believing that plaintiff was the congregation's permanent pastor.

Plaintiff did not tell the congregation of his intention to remain only temporarily at Vernonia; however, plaintiff immediately called Swor about the letter and, later, met with Cooke to discuss plaintiff's concerns about his status at Vernonia. Soon after that meeting, plaintiff called Swor and told him again that he did not wish to remain at Vernonia on a long-term basis. Swor followed up with a letter stating that plaintiff's [865] health insurance would continue to be covered for up to six months, that Swor would send a check for $3,300 to subsidize plaintiff's first three months of salary, and that those gifts would not be expected to be repaid in any way. The letter further indicated that the understanding between Swor, Cooke, and plaintiff was that plaintiff was not staying on permanently, but that plaintiff would not be referred to as "interim" and communication with the Vernonia council would remain as it was.

In April 2004, plaintiff, with the Vernonia council's knowledge, withdrew $3,000 from the church account. He discussed that transaction with the council, explaining that the money had been earmarked for him as a gift. The council accepted that explanation and issued the check in accordance with its normal procedures, including having two individuals (in this instance, plaintiff and a council member) sign the check. The expenditure was further

documented in expense reports that were sent to the district offices. Plaintiff subsequently deposited that check into a personal checking account and wrote four checks against that amount totaling $1,844.16 to cover health insurance premiums.

In June 2004, plaintiff, Cooke, and Swor informed the Vernonia council that plaintiff was only a temporary pastor, and that they were looking for a new pastor to take over the congregation. On July 11, plaintiff told the congregation that he would be leaving. On August 17, Cooke told plaintiff that he had found a new pastor for the Vernonia church and that plaintiff would be transitioned out over the next 30 days.

On August 31, Cooke met with the Vernonia council to discuss the transition with the new pastor. Part of the transition process required the council or superintendent to review the accounting; the Vernonia council's bookkeeper had done so and, at that meeting, asked Cooke to take a look at the April 2004 transaction for $3,000 and let her know if there was a problem with it. Cooke immediately contacted Swor about that transaction, and, on September 15, Swor met with plaintiff about it, telling him that he was being charged with "misappropriation of church funds" for the $3,000 withdrawal, and asked plaintiff for an explanation of the withdrawal. Plaintiff testified that that was the first he had heard of the allegations, that he was "shocked" by Swor's accusation, and that it had come "out of nowhere," and, as a result, he was unable to respond and ended the meeting. Two days later, Swor's secretary called plaintiff and informed him that he "was done at Vernonia" and "to pack [his] bags and leave," which he did.

On October 19, plaintiff had a phone conversation with Swor about the charges of misappropriation; Swor memorialized the "points of agreement" from that discussion in a letter dated November 9, 2004. In those points, plaintiff agreed to return the $3,000 to the Vernonia church through the district office, "as that money was intended for the subsidy of the church for your salary for the first three months of employment there and not to be taken over and above your salary." Furthermore, the letter indicated that, because plaintiff had not chosen to seek reappointment in a Foursquare Church, his license to be a Foursquare pastor would be suspended until he chose to request reinstatement.

In the meantime, Swor and Cooke drafted a letter that Swor read aloud to the Vernonia congregation. Swor and Cooke testified that they wanted to inform the congregation about the circumstances of plaintiff's departure because it "had a right to know what was happening" and because they wanted to avoid speculation and rumors regarding plaintiff and the April transaction. In that letter, Swor explained that, "[t]hrough communication between the district staff and the church council, and a review of the church books and council minutes, it is now evident that there has been, to some extent, a financial misappropriation by former pastor [plaintiff]." That letter also indicated that plaintiff had taken the position in Vernonia on the express condition that he would consider a long-term stay there, that he had told the district in November 2003 that he was not interested in remaining at the church for longer than six months to a year, that he requested the district not look for another pastor until he was ready to leave, and that they [866] respected plaintiff's wishes to not tell the congregation or council that plaintiff

was anticipating leaving the Vernonia church. Finally, the letter indicated that, after discussing the matter with the district, plaintiff had agreed to return the $3,000 in question to the church. It closed by saying, "Where it is not the intention of the district to harm anyone's personal reputation, it is sometimes important to bring difficult issues to the light, so that nothing will hinder the future work of the church."

Plaintiff was unaware of the letter until shortly after Swor read it to the Vernonia congregation, when two congregants confronted him on separate occasions. The first occurred while he visited the home of a Vernonia congregant and that congregant accused him of stealing funds from the church. In the second, a member of the Columbia City congregation approached him in a grocery store and asked him whether it was true that he had stolen funds from the church. Those interactions alarmed plaintiff; he was convinced that he had done nothing wrong and had expected that the issue would be resolved privately between him and the district. He elected not to pay back the $3,000 as he had previously agreed, because he believed that, by doing so, he would be admitting that he was guilty of misconduct. He also contacted Swor, individuals at the Vernonia church, and the International Foursquare organization requesting a copy of the letter that Swor had read to the congregation; they all refused his request. In the course of denying one of those requests, Cooke wrote in an e-mail to Swor's secretary, who had forwarded the request to Cooke, that plaintiff may have "want[ed] to stir up trouble. He has already demonstrated a willingness to lie and steal, and to purposely [sow] discord against the division."

Subsequently, plaintiff requested a meeting to have neutral leadership from the church hear both sides of the misappropriation issue. That meeting occurred in May 2005 and included a couple pastors whom plaintiff claimed "were friends with [Cooke] and [Swor]." Plaintiff subsequently received a letter from Swor indicating that the group had concluded that plaintiff had misappropriated $3,000 above and beyond the $3,300 that the district had promised to him, but that, given his testimony that he had spent $1,500 on health insurance premiums, they were asking him to return only $1,500 of the funds "to bring [his] financial relationship with the church back to good standing."[1] At no point did Swor or anyone else indicate that they would take steps to restore his reputation with the Vernonia or other Foursquare congregations.

Since that time, plaintiff, who is in his fifties, has been unable to find steady work as a pastor in any church, either within or outside of the Foursquare organization. Due to his loss of income, he sold his house and moved into a fifth-wheel trailer with his wife.

Plaintiff ultimately filed a complaint against Cooke, Swor, and the church (hereinafter collectively referred to as defendants) for, among other things, defamation based on the letter read to the congregation stating that plaintiff had misappropriated funds

---

[1] The $1,500 in health insurance premiums reflected in the letter is less than the $1,844.16 that plaintiff testified that he had paid for health insurance. It appears that plaintiff told the church representatives that he had written two $750 checks for health insurance premiums but had actually written four checks totaling $1,844.16 for that purpose: two $761.04 checks and two $161.04 checks.

and the e-mail in which Cooke described plaintiff's willingness to lie and steal.

Before trial, defendants moved for summary judgment, arguing, *inter alia*, that the allegedly defamatory statements were protected by a "First Amendment privilege." That motion was denied by letter opinion, which stated in part:

> "As to the claim that the First Amendment bars this action, I believe that the governing case law, including its application in Oregon, leads to the conclusion that plaintiff is not barred from seeking to protect his reputation on these facts. The issue here is not about doctrine or ecclesiastical processes. The First Amendment case law would be relevant if the action were for wrongful termination and the issue was whether the church organization had the power and right to end the pastor-[867]ate of [plaintiff]. However, this case is not about the power or right to terminate, it is about statements and actions in the process of termination, including the secular process of handling money and communications regarding alleged mishandling of money."

At the close of the evidence, defendants moved for a directed verdict, renewing their argument that the claim was barred by the First Amendment and asserting, alternatively, that they were entitled to a directed verdict on the ground that the statements were qualifiedly privileged and plaintiff had failed to present sufficient evidence for a jury to find that the privilege had been abused.[2] The trial court denied

---

[2] The cases use the terms "qualified privilege" and "conditional privilege" interchangeably; we refer to it as a "qualified" privilege in this opinion.

the motion. The case then went to the jury, which was instructed on the law of qualified privilege.[3] The jury returned a verdict awarding damages to plaintiff, finding that defendants had defamed plaintiff and that they had abused the qualified privilege.

After a judgment was entered for plaintiff, defendants moved for judgment notwithstanding the verdict, ORCP 63, arguing that the First Amendment operated to deprive the court of jurisdiction over the defamation claim. After a hearing, the trial court concluded that "this case is absorbed in this relationship between the Foursquare Gospel Church and * * * [p]laintiff as an employment relationship, and I think that's what the current cases speak to." The trial court granted defendants' motion and entered a judgment to that effect. Plaintiff appeals that judgment.

To establish a claim for defamation, a plaintiff must show that the defendant made a defamatory statement about the plaintiff to a third person. *Wallulis v. Dymowski*, 323 Or. 337, 342-43, 918 P.2d 755 (1996). A defamatory statement is a false statement that would subject the plaintiff "to hatred, contempt or ridicule * * * [or] tend to diminish the esteem, respect, goodwill or confidence in which [the plaintiff] is held or to excite adverse, derogatory or

---

[3] That instruction read, in part, as follows:

> "If you find that the plaintiff has proved by a preponderance of the evidence that defendants [ ] abuse[d the] privilege because defendants did not have objectively reasonable grounds for making their defamatory statements[,] did not believe those statements to be true[,] or made them for a purpose unrelated to the defendants' stated purpose, then the defendants are not entitled to the qualified privilege defense."

unpleasant feelings or opinions against [the plaintiff]." *Farnsworth v. Hyde*, 266 Or. 236, 238, 512 P.2d 1003 (1973) (internal quotation marks omitted; ellipses and first bracketed material in original, others added).

Oregon law recognizes the defenses of absolute privilege and qualified privilege to claims for defamation. An absolute privilege is a bar to the claim, *see Moore v. West Lawn Mem'l Park*, 266 Or. 244, 249, 512 P.2d 1344 (1973) ("When defamatory matter is absolutely privileged no cause of action exists * * *."); however, the Supreme Court has determined that an absolute privilege applies in only a narrow range of circumstances, *DeLong v. Yu Enterprises, Inc.*, 334 Or. 166, 171, 47 P.3d 8 (2002). As the court explained in *Wallulis*, the absolute privilege applies when "the public's interest in the unhampered operation of the government, when exercising such functions, outweighs an individual's interest in the preservation of reputation." 323 Or. at 349, 918 P.2d 755. Thus, for example, statements made as part of judicial and quasi-judicial proceedings are absolutely privileged. *See, e.g., Binder v. Oregon Bank*, 284 Or. 89, 91, 585 P.2d 655 (1978).

A qualified privilege, by contrast, generally "exists to protect three kinds of statements: (1) those made to protect the defendant's interests; (2) those made to protect the employer's interests; or (3) those made on a subject of mutual concern to the defendant and the persons to whom the statement was made." *DeLong*, 334 Or. at 170, 47 P.3d 8 (citing *Wallulis*, 323 Or. at 350, 918 P.2d 755). A qualified privilege is not an absolute bar to a defamation claim but, rather, requires the plaintiff to prove [868] that the defendant abused the privilege. *Wallulis*, 323 Or. at 348, 918

P.2d 755. Abuse occurs and the privilege is lost "if the publisher disbelieves or lacks reasonable grounds to believe that the defamatory statement is true, if the statement is made for purposes outside the scope of the privilege, if the statement is made to someone who is not reasonably believed to be necessary to accomplish the purpose of the privilege, or if the statement includes defamatory matter that is not reasonably believed to be necessary to accomplish the purpose of the privilege." *Lewis v. Carson Oil Company*, 204 Or.App. 99, 104, 127 P.3d 1207, *rev. den.*, 341 Or. 245, 142 P.3d 73 (2006) (citing *Benassi v. Georgia-Pacific*, 62 Or.App. 698, 703, 662 P.2d 760, *adh'd to as modified on recons.*, 63 Or.App. 672, 667 P.2d 532, *rev. den.*, 295 Or. 730, 670 P.2d 1035 (1983)).

"'[T]he question of whether or not a defamatory statement is privileged, either absolutely or conditionally, depends upon the balance that the court strikes between competing interests.'" *Wallulis*, 323 Or. at 348, 918 P.2d 755 (quoting *Lee v. Paulsen*, 273 Or. 103, 105, 539 P.2d 1079 (1975)). In *DeLong,* for example, the court examined that balance and concluded that a qualified, rather than absolute, privilege was appropriate to protect informal statements made to police officers in reporting a crime. 334 Or. at 174, 47 P.3d 8. The court noted that, unlike in judicial proceedings where "'[i]t is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences[,]'" *Id.* at 173, 47 P.3d 8 (quoting Van Vechten Veeder, *Absolute Immunity in Defamation*, 9 Colum. L. Rev. 463, 469 (1909)), citizen reports to police officers "should

receive protection only if they were made in good faith, to discourage an abuse of the privilege." *Id.*

In this case, the First Amendment provides an additional analytical overlay, because the defamation claim involves statements made about a church pastor by church officials. Defendants argue that the trial court correctly granted their JNOV motion because the Free Exercise Clause prohibits the court from adjudicating plaintiff's defamation claim-in their words, that the court lacks subject matter jurisdiction over the claim. Given the above framework, we understand defendants to be arguing that the First Amendment thus operates to create an absolute privilege to plaintiff's claim of defamation.[4] Defendants do not argue that the JNOV was proper because the evidence is insufficient to support the jury's determination that defendants abused the qualified privilege. Thus, the issue presented is a question of law, which we review for errors of law. "It must be borne in mind at the outset that it is for the court, and not the jury, to decide where the line is to

---

[4] Indeed, defendants framed this as a "First Amendment privilege" defense in their trial memorandum, summary judgment motion, and motion for directed verdict. Unlike a situation where the Free Exercise Clause provides immunity from suit, *cf. Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (immunity from suit under Free Exercise Clause entitles party to not stand trial or face litigation; that immunity is effectively lost if a case erroneously goes to trial), civil courts have jurisdiction to adjudicate torts involving religious organizations, *see Presbyterian Church v. Hull Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) ("[N]ot every civil court decision * * * jeopardizes values protected by the First Amendment."). The issue, thus, is not whether civil courts confronted with such torts have jurisdiction, but rather, more accurately stated, whether the First Amendment bars the relief sought by plaintiff.

be drawn between a protected and an unprotected defamatory publication." *Post v. Oregonian Publishing Co.*, 268 Or. 214, 222, 519 P.2d 1258 (1974).

We turn to that issue. The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, states, in part, that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."[5] The United [869] States Supreme Court, in a line of cases beginning with *Watson v. Jones*, 80 U.S. (13 Wall) 679, 20 L.Ed. 666 (1871), has interpreted the Free Exercise Clause to severely restrict the authority of civil courts to adjudicate disputes "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713, 96 S.Ct. 2372, 49 L.Ed.2d 151 (1976). Courts have understood that statement to include church decisions involving the employment of ministers; the District of Columbia Court of Appeals, for example, described it as follows:

> "[C]ourts have consistently held that the Free Exercise Clause of the First Amendment prohibits judicial encroachment into church decisions where those decisions turn on church policy or on religious doctrine or practice. Except for contractual disputes, this prohibition includes church decisions concerning the employment of

---

[5] The parties did not raise any issues under relevant provisions of the Oregon Constitution. Hence, we limit our analysis to the Free Exercise Clause of the First Amendment to the United States Constitution. *See State v. Mendez*, 308 Or. 9, 19, 774 P.2d 1082 (1989) (limiting discussion to the defendant's federal constitutional claim where he "failed to brief or argue any independent state constitutional theory").

> ministers because selection and termination of clergy is a core matter of ecclesiastical self-governance not subject to interference by a state."

Heard v. Johnson, 810 A.2d 871, 882 (D.C.2002) (citations omitted).

However, the First Amendment does not completely bar relief sought by a plaintiff against a church in a civil action. *See, e.g., Jones v. Wolf*, 443 U.S. 595, 99 S.Ct. 3020, 61 L.Ed.2d 775 (1979) (applying "neutral principles" of law to resolve church property dispute where there was no need to examine church doctrine); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) ("[N]ot every civil court decision * * * jeopardizes values protected by the First Amendment."); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 357 (D.C.2005) (applying "neutral principles" approach to parties' contract dispute). Nor does it bar every employment-related suit involving a religious organization. *See, e.g., Minker v. Baltimore Annual Conf.*, 894 F.2d 1354, 1359-60 (D.C.Cir.1990) (allowing claim arising from oral contract between church and pastor if claim was provable without inquiring into church doctrine); *EEOC v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1279 (9th Cir.1982) (First Amendment does not bar Civil Rights Act from being applied to editorial secretary in church publishing house); *Marshall v. Munro*, 845 P.2d 424, 428 (Alaska 1993) (defamation claim by pastor against another church official allowed where the allegedly defamatory statements did not require court to examine qualifications required of pastors).

No United States Supreme Court case-or Oregon appellate case-specifically addresses the applicability

of First Amendment protections to churches and other religious groups defending against allegations of defamation by a church pastor. In the few Oregon cases that have involved disputes over allegedly defamatory statements involving churches and other religious organizations, the appellate courts did not reach the question of First Amendment protection. *See Murphy v. Harty*, 238 Or. 228, 239-40, 393 P.2d 206 (1964) (defendant church did not file timely demurrer in defamation action by former minister); *Muresan v. Philadelphia Romanian Pentecostal Church*, 154 Or.App. 465, 474, 962 P.2d 711, *rev. den.*, 327 Or. 621, 971 P.2d 413 (1998) (defendant church failed to preserve its contention that allegedly defamatory statements were subject to an absolute constitutional privilege).

However, in *Christofferson v. Church of Scientology*, 57 Or.App. 203, 644 P.2d 577, *rev. den.*, 293 Or. 456, 650 P.2d 928 (1982), *cert. den.*, 459 U.S. 1206, 1227, 103 S.Ct. 1196, 1234, 75 L.Ed.2d 439, 468 (1983), we considered whether the First Amendment offered protections to a religious organization defending against a claim of fraud by a former member of the church.[6] Citing *Wiscon-*[870]*sin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), we explained that "[t]he

---

[6] In *Christofferson*, the plaintiff had become a member of the Church of Scientology and paid for and participated in various courses and activities promoted by the church. 57 Or.App. at 207-08, 644 P.2d 577. The plaintiff later renounced her association with the church and sued both the local chapter and its governing organization for fraud, among other things, alleging that the church induced her to engage in the activities by making misrepresentations regarding the quality, benefits, and other characteristics of the activities in which she had engaged. *Id.* at 227-28, 644 P.2d 577.

fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be 'religious.'" *Christofferson*, 57 Or.App. at 239, 644 P.2d 577. We also observed that

> "[a] defense based on the Free Exercise Clause presents particular difficulties in an action for fraud. To establish fraud, a plaintiff must ordinarily prove that the representations made were false. * * * However, when religious beliefs and doctrines are involved, the truth or falsity of such religious beliefs or doctrines may not be submitted for determination by a jury." *Id.* at 235-36, 644 P.2d 577 (citing *United States v. Ballard*, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); *Meader v. Francis Ford, Inc.*, 286 Or. 451, 595 P.2d 480 (1979)).

In *Christofferson,* the defendants requested that the trial court determine which of the alleged misrepresentations were religious and withdraw from the jury the issue whether those statements were true or false. *Id.* at 237, 644 P.2d 577. The trial court instead submitted that decision to the jury-that is, whether the allegedly fraudulent statements were religious-along with instructions that it was not to decide the truth or falsity of any statements that it found to be religious. *Id.* On appeal, the defendants argued that the trial court must "determine in the first instance the religious character of statements alleged to be fraudulent and that, if it is determined that the statements relate to religious beliefs or practices, further inquiry is forbidden." *Id.*

Following the approach taken by the court in *Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C.Cir.1969), we concluded that the trial

court was required to determine the religious character of the alleged misrepresentations only if it could do so as a matter of law-that is, only if the sole conclusion that could be drawn from the evidence was that the alleged misrepresentations were purely religious. *Christofferson*, 57 Or.App. at 238, 644 P.2d 577.

Determining whether a representation is purely religious as a matter of law, we held, involves three inquiries: First, is the defendant organization of a religious nature? *Id.* at 239-41, 644 P.2d 577. Second, do the statements themselves relate to the religious beliefs and practices of the organization? As we explained,

> "[i]t is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud. * * * If the statements involved here do not concern the religious beliefs and practices of the [religious organization], the Free Exercise Clause provides no defense to plaintiff's action."

Id. at 241, 644 P.2d 577 (citation omitted). Finally, even if the statements are made on behalf of a religious organization and have a religious character, are they nonetheless made for a "wholly secular" purpose? *Id.* at 242, 644 P.2d 577. On that point, we explained that some ideas-such as "the nature of a supreme being" and "the value of prayer and worship"-"must always and in every context be considered religious as a matter of law," but that others are "religious only because those espousing them make them for a religious purpose." *Id.* at 243-44,

644 P.2d 577.[7] *See also Checkley v. Boyd*, 170 Or.App. 721, 731, 14 P.3d 81 (2000), *rev. den.*, 332 Or. 239, 28 P.3d 1174 (2001) (applying *Christofferson* analysis and holding that the defendants' free exercise defense did not provide a basis for dismissal of the plaintiff's intentional infliction of emotional distress claim because some of the plaintiff's allegations-such as allegations that the defendants had accused the plaintiff of physically abusing, stealing from, and neglecting his brother-would not "always and in every context" be considered religious in nature).

[871] We see no reason why that test should not guide our analysis in this case as well-that is, in the context of a free exercise defense to a claim for defamation made by a pastor against his church. An action for defamation-like fraud-generally requires the plaintiff to prove that the representations made were false. We recognized in *Christofferson* that a defense based on the Free Exercise Clause presents "particular difficulties" in that situation because the provision prohibits a jury from inquiring into the truth or falsity of religious beliefs or doctrines. 57 Or.App. at 235-36, 644 P.2d 577. However, *Christofferson* demonstrates that the task is not impossible-rather, it provides an appropriate framework for

---

[7] In *Christofferson*, we concluded that the latter inquiry presented a jury question-that is, there was evidence from which a jury could conclude that the representations were made for a wholly secular purpose-and, therefore, the trial court did not err in refusing to withdraw the statements from the jury. 57 Or.App. at 244, 644 P.2d 577. Although we held in the plaintiff's favor on that issue, we ultimately reversed and remanded for a new trial based on erroneous jury instructions related to the defendants' Free Exercise Clause defense. *Id.* at 248, 644 P.2d 577.

ensuring that the jury will not be required to pass on the veracity of a defendant's religious beliefs in violation of the Free Exercise Clause, even when falsity is an element of the claim in question.

Defendants insist, however, that the "religious character" test of *Christofferson* is inapplicable, pointing out that its holding "that only 'purely religious' statements are protected by the First Amendment was *not* applied to defamatory statements about pastors in the context of an internal church dispute about their conduct as pastors." (Emphasis in original.) They argue that, because the plaintiff in *Christofferson* was a former church member, not a pastor, and her claims involved fraud and intentional infliction of emotional distress, rather than defamation, "[t]he issue of the Court becoming entangled in who 'speaks for the church' in the role of a pastor was not addressed."[8] (Emphasis in original.) In defendants' view, therefore, it is appropriate for us to consider cases from other jurisdictions that have considered the issue.

In particular, defendants urge us to follow the approach adopted by the District of Columbia Court of Appeals in *Heard.* In *Heard,* a pastor sued his employer church for wrongful eviction when the church became dissatisfied with his performance and voted to remove him. 810 A.2d at 875. While that case was pending, the pastor remained in his position in the church, and members of the church wrote a manual documenting the reasons for the pastor's

---

[8] In any event, defendants argue that the statements at issue in the present case "were not wholly secular because they were made solely to other Church members and concerned plaintiff's conduct while serving as a pastor."

dismissal in accordance with its governance procedures. *Id.* The pastor then filed a complaint against the members for defamation based on the alleged publication of that manual. *Id.* at 875-76.

To resolve the question whether the defendants were entitled to the protection of the Free Exercise Clause in defending against that action, the court established the following rule:

> "[C]onstitutional protections afforded by the Free Exercise clause (prohibiting civil court interference in disputes between ministers and churches) extend to defamation claims, when: (1) such a claim flows entirely from an employment dispute between a church and its pastor so that consideration of the claim in isolation from the church's decision as to the pastor is not practical, (2) the alleged 'publication' is confined within the church, and (3) there are no unusual or egregious circumstances."

Id. at 885.[9]

We are not persuaded that that is the correct rule. The court in *Heard* correctly recognized that, although church decisions concerning the employment and termination of ministers implicate a "core matter of ecclesiastical self-governance," the church's autonomy in those matters is not absolute. *Id.* at 882. Instead, the court held, "weighing the free exercise protections against important state interests requires a 'delicate balancing.'" *Id.* at 883 (quoting *McDaniel v. Paty*, 435 U.S. 618, 628 n. 8, 98 S.Ct.

---

[9] Applying that test, the court then determined that the plaintiff's claim could not be practically isolated from the employment dispute, and, hence, concluded that the First Amendment barred plaintiff's claim. *Heard*, 810 A.2d at 885.

1322, 55 L.Ed.2d 593 (1978)). In the case of a defamation claim arising out of a church's employment relationship with its pastor, the court concluded that that balance tips in favor of First Amendment protection for the [872] church against such a claim to protect the church's ability to choose its leaders. *Id.* at 884-85. That is so, the court held, "because resolution of the claim would require an impermissible inquiry into the church's bases for its action." *Id.* at 883. In other words, in that situation, even though the alleged defamatory statements may not overtly express religious principles or beliefs, it would be impractical to consider the statements separately from the church's decision as to the pastor. *Id.*

However, the *Heard* court did not go so far as to hold that the First Amendment foreclosed civil courts from ever granting relief on a defamation claim arising between pastors and their churches-in other words, the court recognized that the First Amendment privilege is not absolute. First, the court appears to have limited its holding to defamation claims flowing "entirely from an employment dispute." *Id.* at 885. Moreover, it explicitly recognized that, even in a defamation claim arising out of an employment dispute, "unusual or egregious circumstances" might take the claim out of the realm of First Amendment protection. *Id.* The court noted, for example, that "a potentially defamatory charge of child molestation might be actionable under the *Sherbert* exception[,]" *id.*, referring to *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (recognizing the state's ability to restrict religious activity when the activity "pose[s] some substantial threat to public safety, peace or order").

That example only illustrates the difficulties inherent in applying the *Heard* test. Harkening back to the underpinnings of the Free Exercise Clause, we fail to understand how a defamatory statement accusing a pastor of theft is any more (or less) a matter of church "discipline, faith, internal organization, or ecclesiastical rule, custom, or law[,]" *Serbian*, 426 U.S. at 713, 96 S.Ct. 2372, than is a defamatory statement accusing a pastor of child molestation.

As in *Christofferson*, the court in *Heard* struggled to strike a balance between the constitutional protection against civil courts adjudicating disputes involving religious beliefs and practices, while at the same time holding religious groups accountable for tortious behavior based on nonreligious conduct. We conclude that *Christofferson* offers the more tenable approach for achieving the appropriate balance between those competing interests. *See Wallulis*, 323 Or. at 348, 918 P.2d 755 ("[T]he question of whether or not a defamatory statement is privileged, either absolutely or conditionally, depends upon the balance that the court strikes between competing interests." (quoting *Lee*, 273 Or. at 105, 539 P.2d 1079)).

Applying the principles of *Christofferson* to a defendant's assertion of a free exercise defense to a defamation claim by a pastor against his or her church is relatively straightforward: If the organization is of a religious character, and the alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious, then the statements are purely religious as a matter of law, and the Free Exercise Clause bars the plaintiff's claim. In defamation law terms, those statements enjoy an absolute privilege.

If, however, the statements-although made by a religious organization-do not concern the religious beliefs and practices of the religious organization, or are made for a nonreligious purpose-that is, if they would not "always and in every context" be considered religious in nature-then the First Amendment does not necessarily prevent adjudication of the defamation claim, but the statements may nonetheless be qualifiedly privileged under established Oregon law.[10]

[873] In this case, the alleged defamatory statements-that the pastor had misappropriated money and had demonstrated a willingness to lie-would not "always and in every context" be religious in nature. Thus, even though the statements related to plaintiff's conduct as a pastor of the church, that fact does not render those statements absolutely privileged as a matter of law under the Free Exercise Clause. Rather, that fact gives rise to a qualified privilege. As discussed above, a qualified privilege to make a statement arises when the statement is made

---

[10] We note that the Alaska Supreme Court has taken a similar approach. In *Marshall*, the plaintiff, a Presbyterian minister, brought defamation claims against another minister based on allegations that that minister had made false statements to the plaintiff's prospective new church that the plaintiff was dishonest and unable to perform his pastoral duties due to throat surgery, and that he had made an improper advance to a member of his previous congregation. 845 P.2d at 425. The court held that, because resolution of the claims did not require a determination of the plaintiff's qualifications to be a minister or what those qualifications might be, the court was not divested of jurisdiction of the claim by the First Amendment; rather, the court concluded, the allegedly defamatory statements were subject to a qualified privilege. *Id.* at 428-29 (citing *Murphy*, 238 Or. at 244, 393 P.2d 206).

to protect the interests of the plaintiff's employer or it is on a subject of mutual concern to the defendant and the persons to whom the statement is made. *Benassi*, 62 Or.App. at 702, 662 P.2d 760. As to the first category, the Supreme Court has explained that "employees and their private employers have a legitimate interest in free communications on work-related matters, especially when reporting actual or suspected wrongdoing." *Wallulis*, 323 Or. at 350, 918 P.2d 755. Moreover, in *Murphy,* the court recognized that communications between church officials on the subject of charges that led to the dismissal of a former missionary of the church-that is, communications "on a subject of common concern to both of them"-were subject to a qualified privilege. 238 Or. at 244, 393 P.2d 206.[11] The *Restatement (Second) of Torts* § 596, comment e (1977), supports that position:

> "The common interest of members of religious, fraternal, charitable or other non-profit associations, whether incorporated or unincorporated, is recognized as sufficient to support a privilege for communications among themselves concerning the qualifications of the officers and members and their participation in the activities of the society. * * * So too, the rule is applicable to communications between members and officers of the organization concerning the legitimate conduct of the activities for which it was organized."

The burden then falls on the plaintiff to prove that the qualified privilege was abused-that is, that the defendant did not believe the statement to be true or lacked reasonable grounds for believing that it was

---

[11] The First Amendment defense was not at issue in that case.

true, or that the statement was made for a purpose outside the scope of the privilege. *Lewis*, 204 Or.App. at 104, 127 P.3d 1207 (citing *Benassi*, 62 Or.App. at 703, 662 P.2d 760); *see also Murphy*, 238 Or. at 244, 393 P.2d 206 ("Such a communication, if bona fide made, even though it contains criminating matter which otherwise would be actionable, is protected by the privilege, and where a prima facie case of privilege is established, as here, the burden devolves upon the plaintiff to produce evidence of actual or express malice * * *."). In our view, determining whether defendants had reasonable grounds for believing the defamatory statements or whether the statements were made for purposes outside the purpose of the privilege can be resolved without requiring the court to delve into the ecclesiastical concerns of the church.

In sum, we reject defendants' contention that the First Amendment provides an absolute bar to plaintiff's defamation claim in this case. Because that proposition was the sole basis for defendants' JNOV motion, and the trial court granted defendants' motion on that basis, it follows that the court erred.[12]

Reversed and remanded with instructions to reinstate the jury's verdict.

---

[12] Although defendants also sought a directed verdict on the alternative ground that the statements were qualifiedly privileged and plaintiff had failed to present sufficient evidence for a jury to find that the privilege had been abused, they did not renew that argument in their JNOV motion, and they are not defending the JNOV on that basis on appeal. Thus, we need not explore whether there were factual issues for the jury on that defense.

APPENDIX C

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 0509-10015

TIM TUBRA, an individual,
Plaintiff,

v.

JOHN MICHAEL COOKE, and RON SWOR, individuals; and THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California nonprofit corporation,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants' Motion for Judgment Notwithstanding the Verdict came regularly for hearing before the Court on November 7, 2006, The Honorable Pierre Van Rysselberghe presiding. Plaintiff was represented by his attorneys, Christopher Lundberg and Matthew Malmsheimer. Defendants were represented by their attorneys, Jeffrey Eden and John Kaempf. The Court considered the briefing and evidence submitted by the parties, and heard and considered oral argument by counsel for the parties.

Now, therefore, the Court being fully advised,

IT IS HEREBY ORDERED that, for the reasons stated by the Court on the record, defendants' Motion for Judgment Notwithstanding the Verdict is granted, and defendants are entitled to a Judgment in their favor on all of plaintiff's claims.

DATED: November 29, 2006.

By: /s/ Pierre Van Rysselberghe
THE HONORABLE PIERRE VAN RYSSELBERGHE
CIRCUIT COURT JUDGE

Submitted by:

/s/ John Kaempf
John Kaempf, OSB #92539
Attorneys for Defendants

APPENDIX D

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 0509-10015

TIM TUBRA, an individual,
Plaintiff,

v.

JOHN MICHAEL COOKE, and RON SWOR, individuals; and THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California nonprofit corporation,
Defendants.

THIRD AMENDED COMPLAINT
(Defamation; Defamation by Implication)

JURY TRIAL REQUESTED
NOT SUBJECT TO MANDATORY ARBITRATION

Plaintiff Tim Tubra alleges the following:

INTRODUCTION

Plaintiff was a pastor with the Foursquare Church until defendants forced him to leave the ministry and publicly defamed him to parishioners by falsely accusing him of stealing church funds and a laptop computer. As a result of defendants' false accusa-

tions, plaintiff has suffered substantial and potentially irreparable damage to his personal and professional reputation, has been ostracized from a community that was the bedrock of his life for over two decades, has suffered extreme emotional distress that has resulted in sleepless nights and gastrointestinal upset, and has been stripped of the ability to pursue his spiritual calling and vocation.

PARTIES

1.

Plaintiff is an individual who resides in Columbia City, Columbia County, Oregon.

2.

Defendant John Michael Cooke is an individual who, upon information and belief, resides at 59982 Ridgeway Loop, St. Helens, Oregon, 97051.

3.

Defendant Ron Swor is an individual who, upon information and belief, resides at 1883 NE 19th Avenue, Canby, Oregon, 97013-2545.

4.

Defendant International Church of the Foursquare Gospel "(ICFG") is a California nonprofit corporation with its primary place of business at 1910 W. Sunset Blvd, #200, Los Angeles, California, 90026. Defendant ICFG is registered as a foreign nonprofit corporation and is licensed to do business throughout Oregon. Defendant ICFG has substantial contacts in Oregon, with numerous subsidiary districts and churches throughout the state.

5.

Defendant ICFG lists Mr. Steve Overman, 1410 W 13th Avenue, Eugene OR, 97402, as its registered agent in Oregon.

FACTS

6.

At all material and relevant times, defendant Cooke was the Senior Pastor at the Columbia City Foursquare Church and directly supervised and directed plaintiff's job duties.

7.

At all material and relevant times, defendant Swor was the regional superintendent for the Columbia District of the Foursquare Church and directly supervised and directed the job duties of both plaintiff and defendant Cooke.

8.

At all material and relevant times, plaintiff and defendants Cooke and Swor were agents of defendant ICFG, and defendant ICFG granted defendants Cooke and Swor authority to act on its behalf.

9.

At all material and relevant times, defendants Cooke and Swor acted under the actual or apparent authority of defendant ICFG. Their actions as alleged in paragraphs 10-12, 14, 15 and 20-25 were motivated, at least in part, by a desire to serve the interests of defendant ICFG.

10.

In or about November 2003, plaintiff was laid off from the Columbia City Foursquare Church after

pastoring there for approximately two years. In connection with that lay-off, defendant Cooke gave a laptop computer to the Vernonia Foursquare Church. The Vernonia church counsel subsequently authorized plaintiff to keep the laptop computer for his own use.

11.

After laying plaintiff off, defendant Cooke offered plaintiff a position as interim pastor at the Vernonia Foursquare Church. That position was to last for only 4-6 months. The previous pastor at the Vernonia Foursquare Church had split from ICFG to form his own church, and a substantial number of congregants had followed him. Plaintiff was reluctant to accept the position. Plaintiff relied on this representation that the pastoring position was interim only in agreeing to accept this position.

12.

As an additional inducement to accept the pastoring position at the Vernonia Foursquare Church, defendants Cooke and Swor offered plaintiff an additional $3,300 and health insurance coverage for 6 months. Shortly after plaintiff began that pastoring position, defendant Swor confirmed that the $3,300 and insurance were gifts that were not "expected to be repaid in any way."

13.

In reliance on defendants' representations, in or around November 2003, plaintiff accepted the position at the Vernonia Foursquare Church. The health insurance was particularly important to plaintiff, as his son would have been ineligible for his college soccer scholarship without coverage.

14.

In a letter introducing plaintiff to the congregation at the Vernonia Foursquare Church, defendant Cooke stated that plaintiff had been appointed as the permanent pastor of the Vernonia Foursquare Church. That representation of plaintiff as the permanent, rather than the interim pastor, upset and concerned plaintiff. However, plaintiff agreed with defendants Cooke and Swor to leave the communication as it was with the congregation.

15.

That pastoring position, which was originally supposed to last only 4-6 months, continued for nearly 10 months without any indication of efforts by defendants Cook or Swor to find a replacement or any communication to plaintiff regarding his status at the church. Plaintiff became increasingly concerned that defendants were doing nothing to move him from the interim position at the Vernonia Foursquare Church.

16.

Plaintiff was also very concerned about the status of the health insurance. It was defendant's [sic] intention to pay for plaintiff's health insurance beyond the initial six month period if the Vernonia church could not cover that expense. However, neither defendant Swor or Cooke discussed that issue with plaintiff as the end of the initial six month period approached.

17.

On or about April 3, 2004, plaintiff sought authorization from the Vernonia Church council to withdraw $3,000 of the gift from the district to plaintiff for his own use. After discussions, the Vernonia Church

Council authorized the dispersal of those funds. Under ICFG Bylaws, the treasurer of a church may only disburse church funds with the authorization of the church council.

18.

On or about April 7, 2004, Mr. Tubra placed $3,000 of the gift given to him by defendants Cooke and Swor into a personal retirement account. His intention was to use those funds to pay for his and his family's health insurance, and he in fact paid approximately $1,500 of those funds to the Columbia City Foursquare Church for that purpose.

19.

In or about June 2004, the Vernonia church council held a meeting at which plaintiff and defendants Cooke and Swor were present. At that meeting, plaintiff informed the council of the agreement between he and defendants Cooke and Swor that his position as pastor at the Vernonia church was originally only an interim appointment, but that he had instead been introduced to the congregation by defendant Cooke as the permanent senior pastor. Council members present were very concerned about the misrepresentation of plaintiff's status to the congregation and expressed their concern to defendants Cooke and Swor.

20.

On or about September 15, 2004, in a meeting with plaintiff, defendant Swor falsely accused him of misappropriating church assets. Shortly after that, on or about September 17, 2004, defendant Swor dismissed plaintiff from his position at the Vernonia Foursquare Church and suspended his pastor's license with the ICFG.

21.

On or about October 14, 2004, defendant Swor received a letter informing him that plaintiff had obtained the authorization of the Vernonia Church Council for the dispersal of the $3,000 gift. Notwithstanding that evidence, on or about October 27, defendant Cooke read to the Vernonia congregation a letter, written in conjunction with defendant Swor, in which he falsely accused plaintiff of misappropriating church assets. In that same letter, defendants also claimed that plaintiff had originally committed to considering serving as the Vernonia congregation's permanent pastor, had requested that defendant Swor refrain from seeking a permanent pastor during plaintiff's interim appointment, and that he had insisted on not correcting the congregation's misunderstanding regarding his interim status as pastor so "as not to disrupt the church and plant suspicion toward himself."

22.

On or about November 30, 2004, defendant Cooke wrote an e-mail to Teresa McGill, defendant Swor's secretary, in which he stated that Mr. Tubra had "demonstrated a willingness to lie and steal, and to purposely sew [sic] discord against the division."

23.

In or about September 2004, plaintiff applied for unemployment insurance benefits. In response to that claim, defendant Swor wrote a letter to plaintiff indicating that "[a]fter having drawn a full time salary . . . and considering the misappropriation of the $3,000 district subsidy, it really does seem unreasonable to expect this little church to pay you any more." The Vernonia church, at the direction of

defendant Cooke, denied plaintiff's unemployment insurance claim. Defendant Cooke falsely explained to the Employment Department that "[i]t was agreed that [plaintiff] would serve for a minimum of six months, after which time a permanent pastor would be sought. In mid-August, [plaintiff] was notified that a pastor was indeed found, and that his service to the church would conclude in September[.] This transition was not a termination, however, but only a following through on the agreed upon time schedule which was made at [plaintiff's] request."

24.

In a letter dated November 9, 2004, defendant Swor wrote recited [sic] the basis for his discharge of plaintiff. According to defendant Swor, plaintiff had "agreed to return $3,000 to the Vernonia Foursquare Church, by way of the district office, as that money was intended for the subsidy of the church for [plaintiff's] salary for the first three months of employment there and not to be taken over and above [plaintiff's] salary." Defendant Swor also stated that, "since you have chosen to move on and not seek reappointment in a Foursquare church, . . . your license will be suspended[.]"

25.

Plaintiff has attempted to mitigation his damages as the result of his termination.

FIRST CLAIM FOR RELIEF

(Defamation)
(Count One)

26.

Plaintiff realleges each and every one of the allegations set forth above, and additionally alleges the following facts.

27.

As set forth above in paragraph 21, defendant ICFG—by and through its agents, defendants Cooke and Swor—published, without privilege a defamatory allegation of misappropriation against plaintiff to third parties by falsely accusing plaintiff of "financial misappropriation." Defendant Cooke also falsely accused plaintiff of stealing a laptop computer.

28.

As set forth in paragraphs 12, 14, and 16-18, those defamatory allegations were false.

29.

That false and defamatory allegation has injured plaintiff's reputation by imputing to plaintiff the commission of a crime of moral turpitude and an unfitness and lack of integrity to perform his duties as a Foursquare pastor, and by prejudicing plaintiff in his pursuit of that chosen profession.

30.

As evidenced by paragraphs 11, 12, 14 and 16-18, defendants made their defamatory statements about plaintiff with knowledge of or reckless disregard for the falsity of those statements.

31.

Defendants' defamatory statements have caused plaintiff to suffer damages in the following respects:

a. By stripping him of his livelihood as a pastor in the Foursquare Church and his income from that position, including salary and benefits, in an amount to be proved at trial but currently estimated at $250,000;

[sic – b. omitted]

c. By denying him the ability and opportunity to pursue his spiritual calling and by calling his moral character into question before the Foursquare community in which Plaintiff had been deeply involved for over two decades;

d. By isolating him from the Foursquare community and by making him an object of suspicion in that community in which he had previously been held in high esteem and to which he had devoted his life and his labor; and

e. By causing Plaintiff extreme emotional distress that is evidenced by sleepless nights, gastro-intestinal upset, and frequent crying.

32.

As a direct and proximate result of defendants' defamation, Plaintiff has been damaged personally, professionally, socially, and spiritually in an amount to be specifically proved at trial but currently estimated at $475,000.

(Count Two)

33.

Plaintiff realleges each and every allegation alleged above, excluding paragraph 9. Plaintiff alleges the following additional fact in the alternative to the allegations alleged in paragraph 9.

34.

Defendants Cooke and Swor were acting in their individually capacity and outside the scope of the actual or apparent authority of their agency with ICFG. As such, defendants Cooke and Swor are individually liable for their defamatory statements against plaintiff.

35.

As a direct and proximate result of that conduct, plaintiff has sustained damages as set forth above.

SECOND CLAIM FOR RELIEF

(Defamation)
(Count One)

36.

Plaintiff realleges each and every one of the allegations set forth above, and additionally alleges the following facts.

37.

As set forth above in paragraph 22, defendant ICFG—by and through its agent, defendant Cooke—published, without privilege, a defamatory allegation of theft against plaintiff to a third party by accusing plaintiff of demonstrating "a willingness to . . . steal." Defendant also accused plaintiff of lying and "sowing discord against the division."

38.

As set forth in paragraphs 12, 14, and 16-18, those defamatory allegations were false.

39.

That false and defamatory allegation has injured plaintiff's reputation by imputing to plaintiff the commission of a crime of moral turpitude and an unfitness and lack of integrity to perform his duties as a Foursquare pastor, and by prejudicing plaintiff in his pursuit of that chosen profession.

40.

As evidenced by paragraphs 11, 21, 14 and 16-18, defendant [sic] made those defamatory statements

about plaintiff with knowledge of or reckless disregard for the falsity of those statements.

41.

Defendants' defamatory statements have caused plaintiff to suffer damages as set forth above in paragraph 31.

42.

As a direct and proximate result of defendants' defamation, Plaintiff has been damaged personally, professionally, socially, and spiritually in an amount to be specifically proved at trial but currently estimated at $475,000.

(Count Two)

43.

Plaintiff realleges each and every allegation alleged above, excluding paragraph 9. Plaintiff realleges the following additional fact in the alternative to the allegations contained in paragraphs [sic] 9.

44.

Defendant Cooke was acting in his individual capacity and outside the scope of the actual or apparent authority of his agency with ICFG. As such, defendant Cooke and [sic] is individually liable for his defamatory statements against plaintiff.

45.

As a direct and proximate result of that conduct, plaintiff has sustained damages as set forth above.

THIRD CLAIM FOR RELIEF

(Defamation by Implication)
(Count One)

46.

Plaintiff realleges each and every one of the allegations set forth above, and additionally alleges the following facts.

47.

As set forth above in paragraphs 14, 21 and 22, defendant ICFG—by and through its agents, defendants Cooke and Swor—published, without privilege, statements from which a reasonable person could draw defamatory inferences about plaintiff. By describing plaintiff as "the enemy," stating that plaintiff had been involved in a "financial misappropriation," and had, on his own and without pressure from defendants Cooke and Swor, directed the deception of the congregation regarding his interim status as pastor, defendant [sic] made statements from which a reasonable person could falsely infer that plaintiff was a liar, a thief, and an enemy of the church.

48.

As set forth in paragraphs 12, 14, and 16-18, such defamatory allegations were false.

49.

Those false and defamatory implications have injured plaintiff's reputation by imputing to plaintiff the commission of a crime of moral turpitude and an unfitness and lack of integrity to perform his duties as a Foursquare pastor, and by prejudicing plaintiff in his pursuit of that chosen profession.

50.

As evidenced by paragraphs 11, 12, 14, and 16-18, defendants made their defamatory statements about plaintiff with knowledge of or reckless disregard for the falsity of those statements.

51.

Defendants' defamatory statements have caused plaintiff to suffer damages in the following respects:

a. By stripping him of his livelihood as a pastor in the Foursquare Church and his income from that position, including salary and benefits, in an amount to be proved at trial but currently estimated at $250,000;

[sic – b. omitted]

c. By denying him the ability and opportunity to pursue his spiritual calling and by calling his moral character into question before the Foursquare community in which Plaintiff had been deeply involved for over two decades;

d. By isolating him from the Foursquare community and by making him an object of suspicion in that community in which he had previously been held in high esteem and to which he had devoted his life and his labor; and

e. By causing Plaintiff extreme emotional distress that is evidenced by sleepless nights, gastro-intestinal upset, and frequent crying.

52.

As a direct and proximate result of defendants' defamation, Plaintiff has been damaged personally, professionally, socially, and spiritually in an amount to be specifically proved at trial but currently estimated at $475,000.

(Count Two)

53.

Plaintiff realleges each and every allegation alleged above, excluding paragraphs [sic] 9. Plaintiff alleges the following additional fact in the alternative to the allegations contained in paragraphs [sic] 9.

54.

Defendants Cooke and Swor were acting in their individual capacity and outside the scope of the actual or apparent authority of their agency with ICFG. As such, defendants Cooke and Swor are individually liable for their defamatory statements against plaintiff.

55.

As a direct and proximate result of that conduct, plaintiff has sustained damages as set forth above.

WHEREFORE, plaintiff prays for the following relief:

1. On his First Claim for Relief, for judgment against defendants in an amount to be specifically proved at trial but currently estimated at $475,000;

2. On his First Claim for Relief, for an injunction ordering the defendants to publish in every local newspaper in Columbia County and read to all of the Foursquare Churches in the Columbia District a letter stating that any statements suggesting that plaintiff misappropriated or otherwise mishandled church assets were false and that plaintiff is innocent of any wrongdoing because the money and property at issue were given by the church to plaintiff as a gift;

3. On his Second Claim for Relief, for judgment against defendants in an amount to be specifically proved at trial but currently estimated at $475,000;

4. On his Third Claim for Relief, for judgment against defendants in an amount to be specifically proved at trial but currently estimated at $475,000;

5. On his Fourth Claim for Relief, for judgment against defendants in an amount to be specifically proved at trial but currently estimated at $475,000;

6. On his Fifth Claim for Relief, for judgment against defendants in an amount to be specifically proved at trial but currently estimated at $475,000;

7. For prejudgment interest, costs and disbursements; and

8. For any other relief that the court deems just, equitable, or appropriate.

DATED this 11th day of September, 2006.

HAGLUND KELLEY HORNGREN
JONES & WILDER LLP

By: /s/

Matthew E. Malmsheimer, OSB No. 03384
Christopher Lundberg, OSB No. 94108
Attorneys for Plaintiff

APPENDIX E

IN THE CIRCUIT COURT OF THE
STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. 0509-10015

TIM TUBRA, an individual,
Plaintiff,

v.

JOHN MICHAEL COOKE, and RON SWOR, individuals; and THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL, a California nonprofit corporation,
Defendants.

VERDICT

We, the jury, being first duly empanelled and sworn, find as follows:

1. Did defendants subject plaintiff to defamation?

ANSWER: _X_ yes

___ no

If you answered "no" to question 1, your verdict is for defendants and your presiding juror should sign this Verdict form, otherwise proceed to question 2.

2. Did defendants abuse the privilege?

ANSWER: _X_ yes

____ no

If you answered "no" to question 2, your verdict is for defendants and your presiding juror should sign this Verdict form. If you answered "yes" to question 2, at least the same 9 of you who agreed on the answer to question 1 must also agree on the answer to question 2.

Proceed to question 3.

3. What are plaintiff's damages?

ANSWER: $ 200,000 economic damages

$ 155,000 noneconomic damages

At least the same 9 of you who agreed on the answer to questions 1 and 2 must agree on the answer to question 3.

Your Presiding Juror should sign this Verdict form.

By: /s/ _____
Presiding Juror

APPENDIX F

October 14, 2004

Greetings in the powerful and unchanging name of Jesus Christ!

It is with great thankfulness that we celebrate as a district the new season that you are enjoying as a church in Vernonia. We have every confidence in the Lord that He will continue to join you together in a spirit of unity with your new pastors, and continue to bless you as you partner together for the sake of the gospel.

In a desire to allow the church to move ahead without hindrance from the past, it necessary [sic] for me to address couple [sic] of issues properly for the sake of the record, and to clear up any misunderstandings. Through communication between the district staff and the church council, and a review of the church books and council minutes, it is now evident that there has been, to some extent, a financial misappropriation by former pastor Tim Tubra.

For the purpose of setting forth a truthful record, and in a spirit of full and honest disclosure, we felt it needful for the church membership to be aware of our findings, so that the enemy would not be able to use anything against the church in the future.

1. That Tim Tubra agreed, in October of 2003, to accept an appointment to the Vernonia Foursquare Church, and to make a serious effort to build up the church while considering whether or not he would sense a long-term call to pastor there.

2. That the district committed to paying for full medical and dental insurance for the pastor for the first six months, November through April, in order

not to place an undue burden on the church. This amount totaled $4,566.

3. That, since the church was only able to afford $1,500 per month for the pastor's salary at the point of transition. [sic] To allow Tim to invest full-time service to the church, the district committed to subsidizing an additional $1,100 per month for the first three months to make up the difference of the previous pastor's salary, which was $2,600 per month, [sic]

4. That according to church records, on April 7, 2004, Tim withdrew $3,000 of the $3,300 district subsidy and placed it in his personal retirement account, over and above having drawn $2,600 for each month of his appointment, instead of using that money to reimburse the church, as was instructed in writing by the district.

It has also come to our attention, through discussion with several church members, that there is some misinformation concerning the appointment of Tim Tubra. Because it is important for the district to maintain a healthy relationship of trust with the local church, I need to also make offer [sic] the following facts clear for the record:

1. That Tim Tubra accepting the appointment to serve the church in Vernonia, on the expressed condition that he was still considering the call to that church, and was not simply treating it as an "interim" for his own sake. [sic] In keeping with that agreement, a standard letter of instruction was sent with Tim in an unsealed envelope, in lieu of a personal installment by the supervisor.

2. That Tim called the district office at the end of November 2003, to inform me that he was no longer

interested in considering the permanent assignment in Vernonia, as he had previously committed, but requested permission to stay for six months to a year, until such time as he could find an assignment elsewhere.

3. That Tim requested that the district not proceed to look for another pastor for Vernonia during this interim period, as it might force him to leave before he was ready. With a desire to be gracious and yet guard the church's interest at the same time, I agreed to wait until after Easter to ask the superintendent to pursue other pastoral candidates.

4. That, although it was the initial intention of the superintendent and myself to notify the church counsel of the change in his employment status, Tim insisted that the communication be left as it was as not to disrupt the church and plant suspicion toward himself. Believing he had the best interest of the church in mind, I consented. It is important to state that this concession was at the strong request of Tim, and not once has he requested to tell the church otherwise, nor has the district or its personnel ever instructed Tim not to disclose his intentions. Rather, that we deferred these matters to Tim's discretion as the pastor of the church. [sic]

It is important for you to know, after discussing the financial misappropriation issue with Tim, he has agreed to return the $3,000 to church [sic], which we believe to be an important step towards resolving the matter. Our hope and prayer is that the Lord would continue to provide the Vernonia Church provision and blessing, as it pursues the vision for reaching the community for Jesus.

Where it is not the intention of the district to harm anyone's personal reputation, it is sometimes important to bring difficult issues to the light, so that nothing will hinder the future work of the church. It is our hope that the Lord would bear witness to our testimony, and that the open and gracious disclosure of the truth would allow the church to move on in a spirit of unity and trust.

In the Grace of God,

Pastor Ron Swor
Columbia District Supervisor
International Church of the Foursquare Gospel

APPENDIX G

From: Mike Cooke [jmcooke1@yahoo.com]
Sent: Tuesday, November 30, 2004 7:23 PM
To: Teresa McGill
Subject: Re: Vernonia

Teresa,

Ron [Swor] can call me if he wants. There are not two letters sent, unless he is talking about the letter of introduction. You have both on file. I would not give them to him, but it is up to you. Nothing has been said that is not public record. Tim [Tubra] may just be wanting to stir up trouble. He has already demonstrated a willingness to lie and steal, and to purposely sew [sic] discord against the division. My feeling would be hesitant to give him any ammunition.

The instruction I gave to Sandy Hart, the administrator, was to keep the letter on file, and to show it to any member who wanted to read it, but not to disseminate copies, for that very reason. This was per Ron's instruction. If you decide otherwise, please let me know.

Mike

Teresa McGill <tmcgill@canbyfoursquare.com> wrote:

Mike,

Tim Tubra called me today and asked for copies of 2 more letters, the first one sent to the congregation and the last one sent. Ron [Swor] was wondering what your thoughts were? Do you know the purpose of this request?

Thanks

Teresa

181

(2)

SUPREME COURT, U.S.
FILED

No. 10-559

IN THE

Supreme Court of the United States

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL

Petitioners,

v.

TIM TUBRA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF OREGON

BRIEF IN OPPOSITION

CHRISTOPHER LUNDBERG
Counsel of Record
MATTHEW E. MALMSHEIMER
HAGLUND KELLEY JONES
& WILDER LLP
200 SW Market, Suite 1777
Portland, OR 97201
(503) 225-0777
clundberg@hk-law.com

Counsel for Respondent

233166

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Have petitioners presented compelling reasons to grant the petition where: 1) the factual crux of petitioners' argument does not exist (*i.e.* there was no termination nor discipline of a pastor); 2) in order to reach petitioners' argument this Court would be required to ignore the facts in the record and overrule Oregon state law; and 3) the lower courts (including the Oregon Court of Appeals) have consistently applied this Court's First Amendment jurisprudence?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
I. Petitioners Present This Case on Facts That Never Existed	1
II. Statement of the Facts	2
REASONS FOR DENYING THE PETITION	5
I. The Record Below Does Not Raise the Question Presented by Petitioners	5
II. In Order to Reach the Question Presented by Petitioners, This Court Would Have to Overrule Oregon State Law	6
III. This Court has Provided Clear Guidance to the Lower Courts Regarding the Scope of the First Amendment Protections for Churches in Disputes with Their Ministerial Employees	8

Contents

Page

IV. There is No Split in Legal Authority Among the Lower Courts; the Diversity of Results Reflects Only the Diversity of Facts Before the Courts 12

V. The Oregon Court Of Appeals Announced The Correct Rule Of Law. 16

CONCLUSION 18

TABLE OF APPENDICES

APPENDIX — LETTER FROM THE COLUMBIA DISTRICT OF FOURSQUARE CHURCHES TO THE OREGON EMPLOYMENT DEPARTMENT DATED SEPTEMBER 29, 2004 ..... 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 9, 10

Alberts v. Devine,
479 N.E.2d 113 (Mass.), *cert. denied*,
474 U.S. 1013 (1985) 15, 16

American Title Ins. Co. v. Lacelaw Corp.,
861 F.2d 224 (9th Cir. 1988) 6

Ball v. Gladden,
250 Or. 485, 443 P.2d 621 (1968) 7

Black v. Snyder,
471 N.W.2d 715 (Minn. App. 1991) 15

Bourne v. Center on Children, Inc.
838 A.2d 371 (Md. App. 2003), *rev. denied*,
846 A.2d 401 (Md. 2004) 13

Bowen v. Kendrick,
487 U.S. 589 (1988) 10

Brady v. Pace,
108 S.W.3d 54 (Mo. App. 2003) 13

Brazauskas v. Fort Wayne-South Bend Diocese, Inc.,
714 N.E.2d 253 (Ind. App. 1999) 13

Cited Authorities

Page

Calvary Christian School, Inc. v. Huffstuttler,
238 S.W.3d 58 (Ark. 2006) 15

Cha v. Korean Presbyterian Church of Washington,
553 S.E.2d 511 (Va. 2001), *cert. denied*,
535 U.S. 1035 (2002) 13, 16

Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of Law v. Martinez,
___ U.S. ___, 130 S. Ct. 2971 (June 28, 2010) 5-6

Christofferson v. Church of Scientology,
57 Or. App. 203, 644 P.2d 577, *rev. denied*,
293 Or. 450, 650 P.2d 928 (1982),
cert. denied., 459 U.S. 1206 (1983) 17

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 11

Connor v. Archdiocese of Philadelphia,
975 A.2d 1084 (Pa. 2009) 15

Day v. Advanced M & D Sales, Inc.,
336 Or. 511, 86 P.3d 678 (2004) 6

Downs v. Roman Catholic Archbishop of Baltimore,
683 A.2d 808 (Md. App. 1996) 13, 15

Cited Authorities

Page

Drevlow v. Lutheran Church, Missouri Synod,
991 F.2d 468 (8th Cir. 1993) 14

Employment Div., Dept. of Human Resources of Oregon v. Smith.,
494 U.S. 872 (1990) 11

Gonzalez v. Roman Catholic Archbishop of Manila,
280 U.S. 1 (1929) 9, 10

Goodman v. Temple Shir Ami, Inc.,
712 So.2d 775 (Fla. App. 1998), *cert. denied*,
528 U.S. 1075 (2000) 13, 16

Gorman v. Swaggart,
524 So.2d 915 (La. App.), *rev. denied*,
530 So.2d 571-75 (La. 1988), *cert. denied*,
489 U.S. 1017 (1989) 15, 16

Hampton Tree Farms, Inc. v. Jewett,
320 Or. 599, 892 P.2d 683 (1995) 6

Heard v. Johnson,
810 A.2d 871 (D.C. 2002) 13, 15

Higgins v. Maher,
258 Cal. Rptr. 757 (Cal. App. 1989)
rev. denied (Cal. August 10, 1989),
cert. denied, 493 U.S. 1080 (1990) 13, 15, 16

Cited Authorities

Page

Hiles v. Episcopal Diocese of Massachusetts,
773 N.E.2d 929 (Mass. 2002) 13, 15

Hutchison v. Thomas,
789 F.2d 392 (6th Cir. 1986), *cert. denied*,
479 U.S. 885 (1986) 13, 15, 16

In re Godwin,
293 S.W.3d 742 (Tex. App. 2009) 14

Jackson v. Presbytery of Susquehanna Valley,
697 N.Y.S.2d 26 (N.Y. App. 1999) 14

Jacobs v. Mallard Creek Presbyterian Church, Inc.,
214 F. Supp. 2d 552 (W.D. N.C. 2002) 13

Jeambey v. The Synod of Lakes and Prairies,
No. CX-95-902, 1995 WL 619814
(Minn. App. Oct. 24, 1995) 13, 15

Jones v. Wolf,
443 U.S. 595 (1979) 10

Lyng v. N.W. Indian Cemetery Protective Assoc.,
485 U.S. 439 (1988) 11

Marshall v. Munro,
845 P.2d 424 (Alaska 1993) 15

Cited Authorities

Page

Ogle v. Church of God,
153 Fed. Appx. 371 (6th Cir. 2005) 13

Ogle v. Hocker,
279 Fed.Appx. 391 (6th Cir. 2008) 15

Patton v. Jones,
212 S.W.3d 541 (Tex. App. 2006), *rev. denied*
(Tex. Jan. 12, 2007) 13

Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,
393 U.S. 440 (1969) 9, 10

Reynolds v. Wood,
998 So.2d 1058 (Ala. App. 2007), *rev. denied*
(Ala. June 20, 2008) 14, 15

Rodriguez ex rel. Rodriguez v. The Holland, Inc.,
328 Or. 440, 980 P.2d 672 (1999) 7

Schoenhals v. Mains,
504 N.W.2d 233 (Minn. App. 1993) 13, 15

Seefried v. Hummel,
148 P.3d 184 (Colo. App. 2005), *rev. denied*,
2006 WL 2590062 (Colo. 2006) 13, 15

Cited Authorities

Page

Serbian Eastern Orthodox Diocese for the United States of Am. and Canada v. Milivojevich,
426 U.S. 696 (1976) 10, 14, 16, 17

Shoup v. Wal-Mart Stores, Inc.,
335 Or. 164, 61 P.3d 928 (2003) 7

Stepek v. Doe,
910 N.E.2d 655 (Ill. App. 2009), *rev. denied*,
919 N.E.2d 366 (Ill. 2009) 13, 15

Thibodeau v. Am. Baptist Churches of Connecticut,
994 A.2d 212 (Conn. App.) *rev. denied*,
3 A.3d 74 (Conn. 2010) 14

Tony and Susan Alamo Foundation v. Sec'y of Labor,
471 U.S. 290 (1985) 10

Trice v. Burress,
137 P.3d 1253 (Okla. App. 2006) 13

Tubra v. Cooke,
233 Or. App. 339, 225 P.3d 862, *rev. denied*,
348 Or. 621, 237 P.3d 221 (2010) 2, 16, 17

Watson v. Jones,
80 U.S. 679 (1891) 9, 10

Page

Whinston v. Kaiser Found. Hosp.,
309 Or. 350, 788 P.2d 428 (1990) 7

Yaggie v. Indiana-Kentucky Synod,
860 F. Supp. 1194 (W.D. Ky. 1994), *aff'd*,
64 F.3d 664 (6th Cir. 1995) 13

Other Authorities

U.S. Const., First Amendment
Caroline M. Corbin, ABOVE THE LAW?
THE CONSTITUTIONALITY OF THE MINISTERIAL
EXEMPTION FROM ANTIDISCRIMINATION LAW,
75 Fordham L. Rev. 1965 (2007) 9

Or. R. Civ. P. 23 B 7

Sup. Ct. R. 10 (c) 12, 16

Sup. Ct. R. 14.4 ..... 1, 6, 8, 18

STATEMENT OF THE CASE

I. Petitioners Present This Case on Facts That Never Existed.

Petitioners misstate the nature of this defamation action by claiming that it arose "from the termination of respondent Tim Tubra" and that it pertains to defamation that occurred "in the course of the church's disciplinary process." Pet. 2. As the record and Petitioners' concessions below conclusively establish, Mr. Tubra was never terminated from the church, nor was he ever subject to any discipline by the church.

Those factual misstatements are the crux of Petitioners' argument. Without them, their position that the First Amendment as interpreted by this Court (and the lower courts following this Court's decisions) necessarily fails. In that regard, Petitioners also misstate the nature of this case when they contend that it pertains solely to the scope of the First Amendment and "does not involve a dispute about the underlying facts." Pet. 3. Petitioners' failure to accurately describe the facts that are critical to this Court's understanding of this case is alone sufficient grounds to deny the petition. Sup. Ct. R. 14.4.

Petitioners also overstate the need for this Court's guidance. While this Court has not ruled on a case presenting identical facts, this Court's First Amendment jurisprudence has provided sufficient guidance to allow the lower courts to develop a consistent body of law. While the lower courts' analytic tests have minor differences in their particulars, the

underlying principles are uniformly in line with this Court's First Amendment jurisprudence. All of the cases protect those church activities that are religious, while holding churches accountable for their secular actions.

Petitioners contend that the First Amendment has been interpreted in conflicting and irreconcilable ways by many state and federal courts. Pet. 21-22. However, the real reason for the differences in the various decisions of the lower courts is the variety of fact patterns presented, not the legal tests or the courts' varying interpretations of the scope of First Amendment protections. In that regard, the Oregon Court of Appeals decision is consistent with the jurisprudence of this Court and the lower courts' decisions that have grown out of that jurisprudence.

II. Statement of the Facts.

Respondent accepts the Court of Appeals statement of facts, *Tubra v. Cooke*, 233 Or. App. 339, 341-46, 225 P.3d 862, *rev. denied*, 348 Or. 621, 237 P.3d 221 (2010). However, in order to clarify the record below and the issues relevant to this Petition, the following facts must be highlighted.

First, Mr. Tubra was never terminated from his position as a pastor of the Foursquare Church. Petitioners' contrary misstatement to this Court is particularly startling given that in all of their pretrial filings, including a Motion for Summary Judgment, and in their motions and argument at trial, Petitioners denied that Mr. Tubra had been terminated. In their Answer, Petitioners denied the sole allegation that they

now claim as their basis for asserting that Mr. Tubra was terminated. Third Am. Compl., ¶ 20; Answer to Second Am. Compl., ¶ 20. In their Motion for Summary Judgment, Petitioners conceded that the conclusion of Mr. Tubra's employment "was *not a termination*, however, but only a following through on the agreed upon time schedule which was made at Mr. Tubra's request." Pet.'s Mot. Summ. J. at 7 (citing Pl's. Dep. Ex. 11) (attached as Appendix) (emphasis added). According to Petitioners, as of September 29, 2004 – two weeks after Mr. Tubra's term at the Vernonia Church had come to its natural conclusion – "he could still [have been] serving there if he had so chosen." *Id.*

This is consistent with the evidence presented at trial, which established that Mr. Tubra's position at the Vernonia Church was temporary and that, at the conclusion of that temporary position, he was transitioned out after Petitioners had found a suitable replacement. Tr. 116, 131-32, 163 and 181. Petitioners conceded this fact at trial, noting that Mr. Tubra was not "out right away" after they had found his replacement and that the case involved Mr. Tubra "leaving his church." Tr. 7 and 79. Petitioner Swor similarly testified that Mr. Tubra's pastoral license was suspended "after he *left his appointment*" at the Vernonia Church because, without an appointment, a pastor's license is suspended as a matter of course. Tr. 284 (emphasis added). Plainly, as shown by the evidence presented at trial and Petitioners' concessions, Mr. Tubra was not terminated from his employment with the Foursquare Church.

Second, Mr. Tubra was never subject to any sort of disciplinary proceeding by Petitioners. As Petitioner Cooke admitted at trial, when the defamatory letter was published, it was not in the context of an investigation of Mr. Tubra's actions as pastor. Tr. 406-07. Further, as noted above, Mr. Tubra's pastoral license was suspended not because he had engaged in any wrongdoing or was facing any discipline by the church, but simply because he had not sought a new appointment with the Church and, as a matter of course, a pastoral license is suspended when the pastor is not in an active pastoral position. Tr. 284. Mr. Tubra was not subject to any discipline by the Foursquare Church.

Finally, Petitioners defamed Mr. Tubra well after his term at the Vernonia Church had come to its natural conclusion. Petitioners first defamed Mr. Tubra on October 27, 2004 – six weeks after his term had come to its natural conclusion. Tr. 131-32; 181-82; Pets.' Ex. 121. Petitioner Cooke next defamed Mr. Tubra on November 30 – two and a half months after that term had concluded. Tr. 215-16, 275. Thus, when Petitioners defamed Mr. Tubra, he was no longer employed by the church and accordingly not subject to its ecclesiastical authority.

REASONS FOR DENYING THE PETITION

I. The Record Below Does Not Raise the Question Presented by Petitioners.

Petitioners frame the question presented to this Court as whether the First Amendment bars Respondent's claim where it is "based entirely on statements made . . . explaining . . . why the church disciplined and terminated the pastor." Pet. at (i). That question, however, is not raised by this case because, as set forth above, Mr. Tubra was never terminated or subject to any disciplinary action by the Church. Petitioners' entire argument hinges on those factual misstatements, which are contrary to the evidence at trial and Petitioners' concessions throughout the litigation of this case.

A review of Petitioners' defamatory letter confirms both that Mr. Tubra was never terminated or disciplined and that Petitioners' have presented this Court with a question not raised by this case. Nowhere in that letter do Petitioners "explain[ ] . . . why the church disciplined and terminated the pastor." That letter does not say a single word about either discipline or termination. Pets.' Appendix F. It does no more than falsely accuse Mr. Tubra of "a financial misappropriation," purportedly only for the "sake of the record, and to clear up any misunderstandings." *Id.*, ¶ 2.

Before this Court, petitioners are bound by their concessions and assertions in the Court below. *Christian Legal Soc'y Chapter of the Univ. of California, Hastings Coll. of Law v. Martinez*, ___ U.S. ___, 130 S.

Ct. 2971, 3005 (June 28, 2010) (Alito, J., dissenting) (recognizing that "[f]actual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them.") (quoting *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)). Furthermore, under Oregon state law, because petitioners successfully relied upon the fact that they never terminated Mr. Tubra's employment in a proceeding before the Employment Department, they cannot assert the contrary position in Mr. Tubra's defamation action. *Day v. Advanced M & D Sales, Inc.*, 336 Or. 511, 524, 86 P.3d 678 (2004); *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 609, 892 P.2d 683 (1995).

Thus, in order to reach the question presented by Petitioners, this Court would have to ignore the evidence and Petitioners' concessions below. Petitioners failed to accurately present this Court with those facts and concessions, which lie at the heart of their Petition. That failure alone is sufficient to deny the petition. Sup. Ct. R. 14.4.

II. In Order to Reach the Question Presented by Petitioners, This Court Would Have to Overrule Oregon State Law.

Petitioners cite to two sources for their contention that Mr. Tubra was terminated. The first is an allegation in the Third Amended Complaint which states that, after a September 15 meeting with Mr. Tubra, Petitioners "dismissed plaintiff from his position." Third Am. Compl., ¶ 20. The second is a conversation between Mr. Tubra and Ron Swor's secretary in which Mr. Tubra was

informed that he was "done" at Vernonia. Tr. 134. However, neither of those sources assists Petitioners. Under Oregon law, the Third Amended Complaint had no operative effect after the close of plaintiff's case-in-chief and, to the extent that Mr. Tubra's testimony about his conversation with Mr. Swor's secretary conflicts with the other evidence at trial, that conflict must be resolved in Mr. Tubra's favor.

Under Oregon law, evidence presented and argued at trial becomes the pleadings, whether or not a party makes a motion to amend. Or. R. Civ. P. 23 B; *Whinston v. Kaiser Found. Hosp.*, 309 Or. 350, 355, 788 P.2d 428 (1990), *overruled on other grounds, Shoup v. Wal-Mart Stores, Inc.*, 335 Or. 164, 174, 61 P.3d 928 (2003). However, to ensure that the amendment was express, at the close of evidence, plaintiff moved to amend the pleadings to conform to the evidence presented at trial. Tr. 503-504. Defendants did not object, and the trial court granted the motion. *Id.* at 504. Thus, once plaintiff closed his case-in-chief and the trial court granted plaintiff's motion to amend, the evidence presented at trial became the operative pleading, and the Third Amended Complaint ceased to have any operative effect. *Rodriguez ex rel. Rodriguez v. The Holland, Inc.*, 328 Or. 440, 445-46, 980 P.2d 672 (1999).

In addition, under Oregon law, reviewing courts are required to resolve any conflicts in the evidence and give the benefit of all inferences in favor of the prevailing party. *Ball v. Gladden*, 250 Or. 485, 487, 443 P.2d 621 (1968). In this case, that is Mr. Tubra. Pets.' App. E. Thus, either as a matter of beneficial inference or a resolution of conflicting evidence, the evidence established that Mr. Tubra was never terminated.

Petitioners place such heavy reliance on the Third Amended Complaint and the phone call from Mr. Swor's secretary because it is the only way that they can take the position that Mr. Tubra was terminated or otherwise disciplined. However, as set forth above, there was no evidence of either, and Petitioners have admitted so. Thus, in order to reach the Question Presented by Petitioners, this Court would not only have to ignore the facts of the case and Petitioners' concessions below, it would also have to overrule or ignore Oregon state law. As with their misstatement of the facts, Petitioners' failure to accurately present this Court with the procedural posture of this case is alone sufficient to deny the petition. Sup. Ct. R. 14.4.

III. This Court has Provided Clear Guidance to the Lower Courts Regarding the Scope of the First Amendment Protections for Churches in Disputes with Their Ministerial Employees.

Petitioners would have this Court believe that the First Amendment protects them from any civil court review, contending that the courts lack "subject matter" jurisdiction over civil actions that pertain to the actions of a minister while he served with a church. Pet. at 24-25. Petitioners seek a rule of law that shields them from any civil action involving a pastor, regardless of the nature of the claim, the context within which the action arose, or whether it implicates anything religious. Such a rule would be a vast departure from this Court's First Amendment jurisprudence.

This Court long ago squarely rejected the proposition that it lacked "subject matter" jurisdiction to decide disputes simply because they pertained to ecclesiastical matters, even disputes involving the appointment of church leadership. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 15-16 (1929). Religious organizations "come before [the Court] in the same attitude as other voluntary associations[;] their rights . . . are equally under the protection of the law, and the actions of their members subject to its restraints." *Watson v. Jones*, 80 U.S. 679, 714 (1891). The civil courts do not inhibit the free exercise of religion "merely by opening their doors" to disputes involving a church. *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

Indeed, this Court has abandoned the notion that mere procedural involvement of the state in a church's affairs violates the First Amendment. Caroline M. Corbin, ABOVE THE LAW? THE CONSTITUTIONALITY OF THE MINISTERIAL EXEMPTION FROM ANTIDISCRIMINATION LAW, 75 Fordham L. Rev. 1965, 2006-08 (2007). "Interaction between church and state is inevitable" and this Court has "always tolerated some level of involvement between the two." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). In order to be unconstitutional, such interaction must be "excessive." *Id.*

The mere involvement of a church in a civil action does not amount to "excessive entanglement." Because a civil action is a single interaction between church and state, it does not involve even a minimal level of ongoing supervision or oversight of a church by the state that

this Court has permitted. *Id.* at 233-34 (unannounced monthly visits by public supervisors in parochial schools do not amount to 'excessive entanglement."); *see also Bowen v. Kendrick*, 487 U.S. 589, 617 (1988) (ongoing monitoring of federal grants to ensure that funds are not spent for religious purposes permissible); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985) (administrative oversight and record-keeping requirements under FLSA do not amount to "excessive entanglement.").

The fact that a dispute involves a church and a pastor does not affect the jurisdiction of the courts. *Gonzalez*, 280 U.S. at 15-16. Rather, it affects the scope of review, permitting the courts to defer to the church's decisions on "matters purely ecclesiastical" such as "questions of discipline . . . faith, or ecclesiastical rule, custom, or law." *Id.* at 16; *Watson*, 80 U.S. at 727. First Amendment values are only jeopardized where litigation involving the church "is made to turn on the resolution . . . of controversies over religious doctrine and practice." *Serbian Eastern Orthodox Diocese for the United States of Am. and Canada v. Milivojevich*, 426 U.S. 696, 710 (1976) (quoting *Presbyterian Church*, 393 U.S. at 449). Where no issues of "doctrinal controversy" are involved, the First Amendment does not require a "rule of compulsory deference to religious authority." *Jones v. Wolf*, 443 U.S. 595, 605 (1979). The Courts are free to apply a neutral law of general applicability provided it "involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or tenets of faith." *Id.* at 602.

Consistent with the foregoing, this Court has recognized that the Free Exercise Clause does not shield religious entities from complying with a "valid and neutral law of general applicability." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879-80 (1990). Such "neutral law[s] of general applicability" that do not "coerce individuals into acting contrary to their religious beliefs" are valid, even where they have the potential to "virtually destroy" the religious practices of a particular group. *Lyng v. N.W. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 450-52 (1988). It is only where the law specifically targets religion without a compelling state interest that the free exercise clause is violated. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534-40 (1993).

Petitioners contend that, in this case, the free exercise rights of the church as an institution are at issue and are accordingly entitled to greater protection than those of the individual practitioners in *Smith*. Pet. at 27-28. However, that would place the "professed doctrines" of the church "superior to the law of the land," making the church a "law unto [it]self," something that *Smith* specifically held the First Amendment was never intended to do. 494 U.S. at 879. Petitioners also contend that this Court has provided insufficient guidance as to the scope of the First Amendment protections afforded to churches in handling their own internal ecclesiastical affairs and concerns. Pet. at 11-22. However, as set forth above, this Court has provided consistent and reliable guidance on that issue. As described more fully below, this Court's guidance has led the lower courts to develop a consistent body of law. Thus, even if the facts of this case supported the

question framed by Petitioners, this Court's jurisprudence has already provided the appropriate guidance to the lower courts in answering that question. Accordingly, Petitioners have failed to provide a compelling reason to grant the Petition. Sup. Ct. R. 10(c).

IV. There is No Split in Legal Authority Among the Lower Courts; the Diversity of Results Reflects Only the Diversity of Facts Before the Courts.

Petitioners contend that there is a split in the lower courts pertaining to "the First Amendment rights of religious institutions to discipline their own clergy without having those decisions second-guessed by secular courts." Pet. at 11. According to Petitioners, this is due to the "absence of definitive guidance by this Court." *Id.* However, Petitioners misidentify the source of the division in the lower courts and overstate the need for additional guidance from this Court.

This Court has provided clear guidance on the scope of First Amendment protections. The decisions of the lower courts, while admittedly applying different specific tests, all decide the issue using the principles announced in this Court's decisions. In short, the various tests all protect that which is religious, while recognizing that churches may be held accountable for their secular actions.

The reason for the apparent "split of authority" is not an inconsistent application of First Amendment principles. Rather, it results from the different facts before each court. For example, the overwhelming

majority of decisions cited by petitioners for their "robust" application of the First Amendment, Pet. at 15-17, arose in the context of a termination.[1] The other cases relied on by Petitioners uniformly arose either out of some other ecclesiastical function, such as a disciplinary proceeding,[2] or some other context in which the courts were required to review the church's assessment of a plaintiff's pastoral qualifications or suitability to remain in the church.[3]

---

[1] *Heard v. Johnson*, 810 A.2d 871 (D.C. 2002); *Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002); *Higgins v. Maher*, 258 Cal. Rptr. 757 (Cal. App. 1989) *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990); *Brady v. Pace*, 108 S.W.3d 54 (Mo. App. 2003); *Patton v. Jones*, 212 S.W.3d 541 (Tex. App. 2006), *rev. denied* (Tex. January 12, 2007); *Seefried v. Hummel*, 148 P.3d 184 (Colo. App. 2005), *rev. denied*, 2006 WL 2590062 (Colo. 2006); *Yaggie v. Indiana-Kentucky Synod*, 860 F. Supp. 1194 (W.D. Ky.1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995); *Hutchison v. Thomas*, 789 F.2d 392 (6th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986); *Goodman v. Temple Shir Ami, Inc.*, 712 So.2d 775 (Fla. App. 1998), *cert. denied*, 528 U.S. 1075 (2000); *Jeambey v. The Synod of Lakes and Prairies*, No. CX-95-902, 1995 WL 619814 (Minn. App. Oct. 24, 1995); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc.*,714 N.E.2d 253 (Ind.App.1999).

[2] *Jacobs v. Mallard Creek Presbyterian Church, Inc.*, 214 F. Supp. 2d 552 (W.D. N.C. 2002); *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929 (Mass. 2002); *Ogle v. Church of God*, 153 Fed. Appx. 371 (6th Cir. 2005); *Stepek v. Doe*, 910 N.E.2d 655 (Ill. App.), *rev. denied*, 919 N.E.2d 366 (Ill. 2009); *Trice v. Burress*, 137 P.3d 1253 (Okla. App. 2006).

[3] *Schoenhals v. Mains*, 504 N.W.2d 233 (Minn. App. 1993); *Bourne v. Center on Children, Inc.*, 838 A.2d 371 (Md. App. 2003), *rev. denied*, 846 A.2d 401 (Md. 2004); *Downs v. Roman Catholic Archbishop of Baltimore*, 683 A.2d 808 (Md. App. 1996);

Conversely, where, as here, a civil action does not arise in the context of a termination or other disciplinary proceeding, and where the claims do not require the courts to review the church's assessment of a plaintiff's religious qualifications, the courts have recognized that a church's First Amendment rights are not jeopardized by such action. For example, in *Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 469-72 (8th Cir. 1993), the Eighth Circuit Court of Appeals allowed a pastor's claim for libel to proceed against the Lutheran Church based on the church's circulation of a false allegation that the pastor's wife had previously been married. Such information, if true, would lead any church within the Synod to automatically pass over the pastor. *Id.* at 470. Relying on this Court's decision in *Milivojevich, supra*, the Eighth Circuit held that the claim was not barred by the First Amendment. *Id.* at 471-72. The Eighth Circuit reasoned that the question of the pastor's fitness to serve was not at issue, and the church had provided no "religious explanation for its actions which might entangle the court in a religious controversy." *Id.* at 472.

Drevlow does not stand alone. Consistent with, and in reliance on, this Court's decisions, where the lower courts can avoid engaging in a review of doctrinal matters or becoming involved in an ecclesiastical dispute, they hold that a pastor's claim against the

---

Thibodeau v. Am. Baptist Churches of Connecticut, 994 A.2d 212 (Conn. App.) *rev. denied*, 3 A.3d 74 (Conn. 2010); *Reynolds v. Wood*, 998 So.2d 1058 (Ala. App. 2007), *rev. denied* (Ala. June 20, 2008); *Jackson v. Presbytery of Susquehanna Valley*, 697 N.Y.S.2d 26 (N.Y. App. 1999); *In re Godwin*, 293 S.W.3d 742 (Tex.App. 2009).

church is not barred by the First Amendment.[4] This is true in cases where, even if the Court is required to decide an arguably ecclesiastical matter, the church's actions have gone beyond the scope of the First Amendment protections – in other words, where the church's actions are non-religious.[5] Importantly, many of the cases relied on by Petitioners also recognize that the First Amendment will not shield a church's actions from civil court review under facts that do not require the resolution of religious controversies or where the church exceeds the scope of the First Amendment's religious protections.[6]

Petitioners' contention that there is a split in authority among the lower courts is wrong. As set forth above, the legal principles announced by this Court have been faithfully applied by the lower courts. The variety of results is indicative of the broad array of facts presented to these courts, not any inconsistent application of this Court's First Amendment

[4] *E.g.*, *Alberts v. Devine*, 479 N.E.2d 113 (Mass.), *cert. denied*, 474 U.S. 1013 (1985); *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084 (Pa. 2009); *Calvary Christian School, Inc. v. Huffstuttler*, 238 S.W.3d 58 (Ark. 2006); *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993); *Black v. Snyder*, 471 N.W.2d 715 (Minn. App. 1991); *Ogle v. Hocker*, 279 Fed.Appx. 391 (6th Cir. 2008).

[5] *Gorman v. Swaggart*, 524 So.2d 915, 921-23 (La. App.), *rev. denied*, 530 So.2d 571-75 (La. 1988), *cert. denied*, 489 U.S. 1017 (1989).

[6] *Schoenhals*, 504 N.W.2d at 235; *Seefried*, 148 P.3d at 189-90; *Heard*, 810 A.2d at 884-85; *Higgins*, 258 Cal. Rptr. at 761; *Hutchison*, 789 F.2d at 395-96; *Hiles*, 773 N.E.2d at 935-37; *Jeambey*, 1995 WL 619814 at *2; *Reynolds*, 998 So.2d at 1060 n.1; *Stepek*, 910 N.E.2d at 668-69; *Downs*, 683 A.2d at 812-13.

jurisprudence. It is thus not surprising that this Court has denied petitions for certiorari on every one of the decisions cited by both parties where Supreme Court review was sought.[7] Accordingly, Petitioners have failed to present a compelling reason to grant the petition. Sup. Ct. R. 10 (c).

V. The Oregon Court Of Appeals Announced The Correct Rule Of Law.

The Oregon Court of Appeals' decision in *Tubra* is consistent with, and relies upon, this Court's First Amendment jurisprudence. *Tubra*, 233 Or. App. at 350-56. The focus of the test described in *Tubra* is whether the conduct at issue is religious, asking whether "alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious." *Id.* at 357. In other words, the test in *Tubra* focuses on whether the controversy is one that can be resolved "without extensive inquiry by civil courts into religious law and polity." *Milivojevich*, 426 U.S. at 709. If religion is specifically targeted by Oregon's defamation law because the conduct at issue is "always and in every context" religious, then a defendant church is entitled to an absolute privilege as a matter of law. *Tubra*, 233 Or. App. at 357. In contrast, where, as in this case, the conduct at issue is susceptible to a number of interpretations, the question of the

---

[7] *Alberts*, 479 N.E.2d 113, *cert. denied*, 474 U.S. 1013 (1985); *Hutchison*, 789 F.2d 392, *cert. denied*, 479 U.S. 885 (1986); *Gorman*, 524 So.2d 915, *cert. denied*, 484 U.S. 1017 (1989); *Higgins*, 258 Cal. Rptr. 757, *cert. denied*, 493 U.S. 1080 (1990); *Goodman*, 712 So.2d 775, *cert. denied*, 528 U.S. 1075 (2000); *Cha*, 553 S.E.2d 511, *cert. denied*, 535 U.S. 1035 (2002).

religious nature of the activity is to be resolved by the fact finder. *Id.*

Not only is this rule consistent with this Court's First Amendment jurisprudence, it also comports with the general principle found in the religion clauses that the State must remain essentially neutral towards religion. Conversely, the rule urged by petitioners would "make available the coercive powers of civil courts to rubber-stamp" the decisions of a religious organization, even where such decisions have no relation to the religious goals, doctrine, or practices of the body in question. *Milivojevich*, 426 U.S. at 734 (Rehnquist, J., dissenting). As Justice Rehnquist noted, granting such deference to religious institutions, while not providing it to similar secular groups, would "in avoiding the free exercise problems petitioners envision, itself create far more serious problems under the Establishment Clause." *Id.*

The Oregon Court of Appeals decision in *Tubra* avoids targeting religion, while ensuring that the courts not lend their power to the establishment of any particular religion. Given the foregoing, it is not surprising that this Court has previously denied review of the identical rule, albeit where the conduct at issue was the fraudulent recruitment of new members rather than the defamation of a former pastor. *Christofferson v. Church of Scientology*, 57 Or. App. 203, 644 P.2d 577, *rev. denied*, 293 Or. 456, 650 P.2d 928 (1982), *cert. denied.*, 459 U.S. 1206, 459 U.S. 1227 (1983).

CONCLUSION

For the reasons set forth above, and in accordance with Supreme Court Rules 10(a)-(c) and 14.4, the Petition should be denied.

Respectfully submitted,

CHRISTOPHER LUNDBERG
Counsel of Record
MATTHEW E. MALMSHEIMER
HAGLUND KELLEY JONES
& WILDER LLP
200 SW Market, Suite 1777
Portland, OR 97201
(503) 225-0777
clundberg@hk-law.com

Counsel for Respondent

APPENDIX — LETTER FROM THE COLUMBIA DISTRICT OF FOURSQUARE CHURCHES TO THE OREGON EMPLOYMENT DEPARTMENT DATED SEPTEMBER 29, 2004

9/29/04

Dear Sirs,

Please forgive the lateness of our response to this notice. The employee [sic] of this claim, Vernonia Foursquare Church, was under the supervision of the filing employee—he was the primary bookkeeper and record keeper. Since his departure, those responsibilities were left to volunteers who were not familiar with the books and did not know what to do with the notice. It was only just recently brought to my attention, as the superintendent overseeing this church, and I am making response now on their behalf. Please accept my apology for missing the 9/27/04 deadline and allow me to explain the situation.

Tim Tubra was under the employ of the Columbia City Foursquare Church until 10/31/03 as an assisting pastor. On 11/01/03 he accepted an assignment from the district office to serve the Vernonia Foursquare Church as the senior pastor. This assignment was offered on a permanent, full-time basis, and he could still be serving there if he had so chosen.

On 11/23/03, Mr. Tubra notified the district office (in Canby, Oregon) that he had decided not to stay on as the permanent pastor and that he preferred to be considered an "interim" pastor until such time as the permanent

pastor could be placed. It is important to note, that the decision to serve in an "interim" capacity was entirely by Mr. Tubra's choice, not wanting to live or serve in Vernonia, but to seek a ministry opportunity in a larger town.

It was agreed that Mr. Tubra would serve for a minimum of six months, after which time a permanent pastor would be sought. In mid August, Mr. Tubra was notified that a pastor was indeed found, and that his service to the church would conclude in September (which was four months longer that [sic] was originally committed). This transition was not a termination, however, but only a following through on the agreed upon time schedule which was made at Mr. Tubras [sic] request.

To our knowledge, Mr. Tubra has had other employment during his tenure in Vernonia, both as a mortgage broker and in real estate sales. It is our opinion that this little church should not be held liable for his decision to leave.

Yours truly,

Mike Cooke
Columbia West Division
Columbia District of Foursquare Churches
503-397-0069

Also feel free to contact District Supervisor Ron Swor at 503-266-4444 for further information.

181

(2)

Supreme Court, U.S.
FILED
FEB 7 - 2011
OFFICE OF THE CLERK

No. 10-559

IN THE

Supreme Court of the United States

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,
Petitioners,

v.

TIM TUBRA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITIONERS' REPLY BRIEF

MARK E. CHOPKO
STRADLEY RONON STEVENS & YOUNG, LLP
1250 Connecticut Ave., N.W.
Suite 500
Washington, DC 20036
(202) 822-9611
mchopko@stradley.com

JOHN T. KAEMPF
Counsel of Record
BROOKSBY KAEMPF PC
121 S.W. Morrison Street
Suite 1100
Portland, OR 97204
(503) 295-7755
jkaempf@brooksbykaempf.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	3
A. The Complaint's undisputed allegations, not the trial evidence, control whether subject matter jurisdiction exists, and they show why the First Amendment bars this case	3
B. The *Tubra* decision adds to the deep conflict among the lower courts about the scope of First Amendment protection for churches against pastor claims that the Court should resolve through accepting this case	9
CONCLUSION	13

TABLE OF CITED AUTHORITIES

CASES Page

Calvary Christian School, Inc. v. Huffstuttler, 238 S.W.3d 58 (Ark. 2006) .. 9
Cha v. Korean Presbyterian Church of Washington, 553 S.E.2d 511 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002) 4
Connor v. Archdiocese of Philadelphia, 975 A.2d 1084 (Pa. 2009) 9
Dippold v. Cathlamet Timber Co., 193 P. 909 (Or. 1920) 3
Employment Division v. Smith, 494 U.S. 872 (1990) 10
Gonzalez v. Roman Catholic Archbishop of Manila, 280 U.S. 1 (1929) 11
Heard v. Johnson, 810 A.2d 871 (D.C. 2002) 5, 9, 10, 11
Higgins v. Maher, 258 Cal. Rptr. 757 (Cal. App.), *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990) 10
Hutchison v. Thomas, 789 F.2d 392 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986) 10
Jones v. Wolf, 443 U.S. 595 (1979) 9, 10
Marshall v. Munro, 845 P.2d 424 (Alaska 1993) 9
Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) 11
McNutt v. General Motors Acceptance Corp. of Indiana, 298 U.S. 178 (1936) 3
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 4
Rodriguez v. The Holland, Inc., 980 P.2d 672 (Or. 1999) 7

TABLE OF CITED AUTHORITIES—Continued

Page

Seefried v. Hummel, 148 P.3d 184 (Colo. App. 2005) 5
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 12
Tubra v. Cooke, et al., 225 P.3d 862 (Or. App.), *rev. denied*, 237 P.3d 221 (Or. 2010) ..... *passim*
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 12
Whinston v. Kaiser Foundation Hospital, 788 P.2d 428 (Or. 1990) 6, 7
Yaggie v. Indiana-Kentucky Synod, 860 F.Supp. 1194 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) 5, 9

RULES AND CONSTITUTIONAL PROVISION

Or. R. Civ. P. 23B 6, 7
U.S. Const. First Amend. ..... *passim*
U.S. Sup. Ct. R. 10(c) 12
U.S. Sup. Ct. R. 14.4 4

OTHER AUTHORITY

John Gibeaut, "First Amendment Rites – Damaging words cost pastor his pulpit but land him big bucks," *ABA Journal*, June 2010 11

IN THE

Supreme Court of the United States

No. 10-559

JOHN MICHAEL COOKE, RON SWOR, AND THE INTERNATIONAL CHURCH OF THE FOURSQUARE GOSPEL,

Petitioners,

v.

TIM TUBRA,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Oregon

PETITIONERS' REPLY BRIEF

INTRODUCTION

Respondent Tim Tubra's ("plaintiffs") opposition does not change the key undisputed fact stated in the opinion at issue here: "No United States Supreme Court case *** specifically addresses the applicability of First Amendment protections to churches and other religious groups defending against allegations of defamation by a church pastor." *Tubra v. Cooke, et al.*, 225 P.3d 862, 869 (Or. App.), *rev. denied*, 237 P.3d 221 (Or. 2010). The very reasoning of the Oregon decision below – rejecting one set of decisions and embracing another, creating its own new test to decide if the First Amendment is implicated, while

criticizing other tests – is the best evidence of why this Petition should be granted. *Tubra* shows that lower courts are split on the applicable *legal* test. Placing itself in the minority view, *Tubra* conflicts with this Court's decisions.

Plaintiff implicitly concedes that if there was a disciplinary decision, the First Amendment bars his claims. (Opp. 13.) Plaintiff then tries to distract the Court away from his pleadings, which control here. There is no dispute that he was a church pastor (a "minister") and that his claims arose from the ending of his employment with his church. There is also no dispute that this is how plaintiff framed his Complaint and why the trial court should not have allowed the case to proceed past the pleadings.

The heart of plaintiff's opposition is that the "termination" and other church discipline-related allegations in his Complaint are not binding, and that factual disputes at trial preclude review here. However, this Court's decisions (and Oregon law) require that plaintiff's Complaint show that secular courts have subject matter jurisdiction over his claims, but it does not. (App. D.) This is why the case should not have been tried, and trial evidence is irrelevant.

Petitioners' First Amendment defense prevails even assuming plaintiff was defamed because courts lack subject matter jurisdiction over his claims. A disciplinary dispute that plaintiff admits is about "Church politics" (Tr 508-509) should not be decided by secular courts.

Accepting review with the undisputed facts alleged in the Complaint here will allow the Court to state a uniform rule of law that the First Amendment is violated when secular courts entertain this kind of

lawsuit. This will also resolve a deep conflict among the lower courts on this important issue of first impression.

ARGUMENT

A. The Complaint's undisputed allegations, not the trial evidence, control whether subject matter jurisdiction exists, and they show why the First Amendment bars this case.

Plaintiff aggressively tries to steer the Court away from the allegations in his operative Complaint by arguing that factual disputes at trial preclude review, and that petitioners "present this case on facts that never existed." (Opp. 1.)

Plaintiff's effort fails because this case concerns First Amendment subject matter jurisdiction, which must first be established by the allegations in the Complaint or a case cannot proceed. *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936) ("He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing."); *see also Dippold v. Cathlamet Timber Co.*, 193 P. 909, 911-913 (Or. 1920) (the "jurisdiction of the subject-matter of any controversy in any court must be determined in the first instance by the allegations in the complaint" and "does not depend upon the existence of a sustainable cause of action or by the evidence subsequently adduced").

Plaintiff's Third Amended Complaint ("Complaint"), which applied at trial, thus establishes the "undisputed facts" for purposes of appeal. It shows that courts lack subject matter jurisdiction over the pastor

defamation claims here because they all arise from statements made solely within the Church concerning why plaintiff's employment with the Church ended. (App. D.) *See Cha v. Korean Presbyterian Church of Washington*, 553 S.E.2d 511, 517 (Va. 2001), *cert. denied*, 535 U.S. 1035 (2002) ("most courts that have considered the question whether the Free Exercise Clause divests a civil court of subject matter jurisdiction to consider a pastor's defamation claims against a church and its officials have answered that question in the affirmative").[1]

Thus, the Complaint failing to establish subject matter jurisdiction is why this case should never have been tried. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) ("the very process of inquiry" violates First Amendment rights).

Although he now contends "there was no termination or discipline of a pastor" (Opp. i.), plaintiff pleaded that a "termination" occurred, for which he sought lost income damages, and those allegations control. (Complaint at ¶¶ 25, 31; App. 37a-39a, 47a.) He also alleged that the Church "dismissed plaintiff from his position" and "suspended his pastor's license." (Complaint at ¶ 20; App. 35a.)[2]

---

[1] This shows that through attaching the operative Complaint and all allegedly defamatory statements (App. D, F-G), petitioners comply with Rule 14.4, contrary to plaintiff's argument.

[2] Concerning cases prohibiting an "assessment of a plaintiff's pastoral qualifications" (Opp. 13), that is involved here through plaintiff's allegation that the Church questioned his "fitness" and "integrity" to be a pastor. (Complaint at ¶ 29; App. 38a.)

Plaintiff's position *now* is that his employment ended in the normal course, conceding, however, that if he was disciplined, the First Amendment bars his claims. (Opp. 13.) The claimed "financial misappropriation" here was confirmed after he left his position, but it is undisputed that he could not have ministry credentials – he was "done" – at that point. (Tr 134.) There is thus no question that there was disciplinary action by Church authorities.[3]

Moreover, even assuming there was no termination or other discipline, when a defamation claim merely "arises" out of a church's employment relationship with its pastor and involves statements made solely within the church, as here, the First Amendment still bars it. *See Heard v. Johnson*, 810 A.2d 871, 883-885 (D.C. 2002); *Yaggie v. Indiana-Kentucky Synod*, 860 F.Supp. 1194, 1198 (W.D. Ky. 1994), *aff'd*, 64 F.3d 664 (6th Cir. 1995) ("Courts should be loath to assert jurisdiction over internal church disputes; its exceptions are rare."). This shows why plaintiff's claims are barred even if the Court accepts as true the facts stated in the *Tubra* opinion and the trial evidence plaintiff cites.[4]

---

[3] Plaintiff argues that the First Amendment does not bar his claims because "he was no longer employed" by the Church when he was defamed. (Opp. 4.) However, courts reject this argument because examination of the statements still requires an impermissible inquiry into church discipline. *See, e.g., Seefried v. Hummel*, 148 P.3d 184, 190-191 (Colo. App. 2005).

[4] Even assuming trial evidence is relevant, it establishes that plaintiff's claims are barred because it confirms that his claims arose from his Church employment. Plaintiff testified that the Church ordered him to "leave" a "short time" after he was accused of misappropriating Church funds – he was "done." (Tr 132-134, 182.) He also testified that what happened was "a career-ending situation." (Tr 143-147.) Moreover, he presented

The allegedly defamatory letter does address termination and discipline, contrary to plaintiff's contention (Opp. 5), by explaining to the congregation why plaintiff no longer works for the Church and his related "financial misappropriation." (App. F.)

Moreover, the letter shows that the alleged defamation arose out of a church employment relationship and a disciplinary decision. *Tubra* concedes that "the statements related to plaintiff's conduct as a pastor of the church." *Tubra*, 225 P.3d at 873. Indeed, "plaintiff requested a meeting to have neutral leadership from the church hear both sides of the misappropriation issue." *Id.* at 866. This is why the First Amendment bars plaintiff's claims.

Attempting to portray this case as a mere "fact dispute" unworthy of review, plaintiff argues that his Third Amended Complaint "ceased to have any operative effect" because he successfully moved to amend to conform to the evidence at trial. (Opp. 7.) Plaintiff is incorrect. He omits that in response to petitioners' JNOV motion, and in an effort to avoid the First Amendment barring the claims in his Third Amended Complaint, he moved to file a Fourth Amended Complaint omitting the discipline-related allegations. However, at the JNOV hearing, the trial judge denied plaintiff's motion and held that the "motion to conform" granted at trial only addressed damages, not liability allegations. The court thus confirmed that Or. R. Civ. P. 23B only allows motions to amend to "conform to" un-pleaded trial evidence, not to *expunge*

---

the expert testimony of a vocational evaluator to support his lost earnings claim. (Tr 331-339, 346-348.) Indeed, the trial court in *Tubra* held that this case "is about statements and actions in the process of termination." *Tubra*, 225 P.3d at 867.

what *was* pleaded and tried. (Tr 25-27, 503-504; JNOV Tr 4, 8-19.)

Plaintiff did not assign error on appeal to the denial of his motion to file a Fourth Amended Complaint. Thus, the Third Amended Complaint controls.

Plaintiff cites *Whinston v. Kaiser Foundation Hospital*, 788 P.2d 428 (Or. 1990), for the proposition that the trial evidence "becomes the pleadings." (Opp. 7.) However, *Whinston* only holds that "the proof" determines whether a cause of action exists, and when an issue "not raised by the pleadings" is tried by consent, a pleading is "automatically amended" for that limited purpose. *Whinston* also does not address subject matter jurisdiction. *Whinston*, 788 P.2d at 431. Here, unlike in *Whinston*, and contrary to the terms of Or. R. Civ. P. 23B, plaintiff unsuccessfully moved to "non-conform" to the proof by attempting to remove the discipline-related allegations from his Complaint. Similarly, in *Rodriguez v. The Holland, Inc.*, 980 P.2d 672, 674 (Or. 1999), cited at Opp. 7, the court merely held that an "amended pleading supersedes the operative pleading." Here, plaintiff's motion to file a Fourth Amended Complaint was denied, and his "motion to conform" only concerned damages. The Third Amended Complaint is thus not superseded.

Therefore, the Oregon authorities above defeat plaintiff's contention that the Court would have to "overrule Oregon state law" to accept review. (Opp. i.)

Plaintiff asserts that, according to petitioners, "as of September 29, 2004," plaintiff could have still been working for the Church, and there was thus no termination. (Opp. 2-3.) However, all allegedly

defamatory statements occurred in October and November 2004, after the September 2004 letter plaintiff attaches to his opposition brief. (App. F-G.) Also, plaintiff alleged that the statement in that letter that this "was not a termination" is false, *i.e.*, plaintiff alleged there *was* a termination, which controls here. (Complaint at ¶¶ 23, 25; App. 36a-37a.)

Plaintiff, citing Oregon judicial estoppel cases, contends that because petitioners previously argued that they did not terminate plaintiff, they cannot contend he was terminated here. (Opp. 6.) Putting aside the fact that plaintiff called this position "false" and alleged he was terminated (Complaint at ¶¶ 23, 25; App. 36a-37a), this ignores that the face of the Complaint must establish subject matter jurisdiction, and the Court thus cannot ignore plaintiff's "termination" allegation. Moreover, even if judicial estoppel applied, it does not change the fact that plaintiff's claims all arise from his employment relationship with a church.

Plaintiff asserts that the "record below does not raise the question presented by petitioners." (Opp. 5.) This is contradicted by the *Tubra* opinion, the First Amendment Affirmative Defense below, and the granted JNOV motion. This Court should not be distracted by plaintiff's attempt to portray this case as requiring the resolution of factual disputes. The undisputed facts in plaintiff's Complaint control. Nothing that happened at trial mitigates the concern that this kind of case cannot be tried without violating the First Amendment.

B. The *Tubra* decision adds to the deep conflict among the lower courts about the scope of First Amendment protection for churches against pastor claims that the Court should resolve through accepting this case.

Plaintiff contends that "there is no split in legal authority among the lower courts," and that "the diversity of results reflects only the diversity of facts before the courts." (Opp. 12-16.) The *Tubra* opinion alone belies plaintiff's argument. *Tubra* cited *Heard* and its 3-part First Amendment test for pastor defamation claims, but held that it was "not persuaded that [*Heard*] is the correct rule." *Tubra*, 225 P.3d at 871. *Tubra* instead relied on *Marshall v. Munro*, 845 P.2d 424 (Alaska 1993), and then stated its own 3-part test, which provides much narrower First Amendment protection than *Heard*. *Tubra*, 225 P.3d at 870-872 and n. 10.

Marshall, in turn, has been rejected by other courts. *Yaggie*, 860 F.Supp. at 1198-1199 (choosing "not to follow the *Marshall* rationale" because "we cannot allow it to outweigh the substantial federal authority holding to the contrary," and barring a minister's defamation claim even though "the alleged defamatory statements do not express any religious principles or beliefs" because the case involved "a conflict confined within" a church "concerning the employment relationship of its minister").

Moreover, Pennsylvania recently issued yet another 3-part test. *Connor v. Archdiocese of Philadelphia*, 975 A.2d 1084, 1103 (Pa. 2009).

Conflicting results are thus occurring not because a consistent test is being applied to different facts.

Indeed, the over 30 cases plaintiff cites (Opp. 13-16) ironically defeat his argument that there is no conflict. There are at least four different *legal tests* that cause different results. "With so many federal and state courts weighing in on the issue, it is no surprise that a split of authority has developed." *Calvary Christian School, Inc. v. Huffstuttler*, 238 S.W.3d 58, 64 (Ark. 2006). It is improper to allow lower courts to apply different legal tests to the same First Amendment text. The Court should accept review to resolve this conflict.

Plaintiff cites *Jones v. Wolf*, 443 U.S. 595 (1979), for the argument that "neutral laws of general applicability" should control here. (Opp. 10.) However, the *Jones* rule only applies to disputes about the ownership of church real estate, not tort claims like defamation. *See Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986) (dismissing a minister's defamation claim based on a lack of subject matter jurisdiction and, citing *Jones*, holding that the "neutral principles doctrine relating to church property is simply not applicable in the instant case.").

Plaintiff's reliance on *Employment Division v. Smith*, 494 U.S. 872 (1990), and related cases (Opp. 11.) is also misplaced because they concern criminal laws, not civil tort claims by pastors against their church that relate to intra-church "communicative activity." *Smith*, 494 U.S. at 879-882. The Church thus does not seek to be a "law unto itself" (Opp. 11), but merely seeks to uphold its constitutional rights against civil claims by its pastors relating to church discipline.

Plaintiff would have this Court ignore the fact that "accusations of misconduct, discussions of that mis-

conduct within the church," and the "exaggerated language that accompany such activities" are "unavoidable parts of the difficult process by which dissatisfied churches end employment relationships with their pastors." *Heard*, 810 A.2d at 887. *See also Higgins v. Maher*, 258 Cal. Rptr. 757, 759-761 (Cal. App.), *rev. denied* (Cal. August 10, 1989), *cert. denied*, 493 U.S. 1080 (1990) (if "civil courts enter upon disputes between bishops and priests because of allegations of defamation," then "it is difficult to conceive the termination case which could not result in a sustainable lawsuit.")

Denying review will thus increase this type of litigation and further impair churches' First Amendment rights. *See also* John Gibeaut, "First Amendment Rites – Damaging words cost pastor his pulpit but land him big bucks," *ABA Journal*, June 2010, at 19 (the court in *Tubra* "acknowledged that they were pushing the envelope," and "observers predict that the initial victory in Oregon will encourage others.").[5]

Churches are legitimately concerned about fitness for service. Where a dispute goes to that issue, it is settled that the civil courts must stay out of the dispute. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 7-8 (1929) (a church's decisions concerning the "qualifications of a chaplain" are accepted as "conclusive" by secular courts). *Gonzalez*

---

[5] Plaintiff's reliance on older cases where this Court denied certiorari (Opp. 16, n. 7) is misplaced because none of those cases allowed a wholly intra-church defamatory statement to be actionable, and a writ denial has "no implication whatever regarding the Court's views on the merits of a case," especially because "[w]ise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-919 (1950).

controls because plaintiff alleged that he was defamed through petitioners imputing to him an "unfitness" and "lack of integrity" to be a church pastor. (Complaint at ¶ 29; App. 38a.) This is why plaintiff's reliance on *Gonzalez* is misplaced.

Tubra did not announce "the correct rule of law." (Opp. 16.) *Tubra* is in the minority in holding that the First Amendment does not bar a pastor's defamation claim arising solely from intra-church statements. *Cf., e.g., Cha* and *Heard*. *Tubra* stands alone in allowing secular juries to decide whether a statement is "purely religious" or has a "nonreligious purpose." *Tubra*, 225 P.3d at 872.

The Court should accept review to resolve the conflict furthered by *Tubra* and settle this important issue of first impression. *Tubra's* legal test is inconsistent with this Court's First Amendment decisions. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 724-725 (1976) (there is "no dispute that questions of church discipline *** are at the core of ecclesiastic concern," and the First Amendment "requires that civil courts accept [a church's disciplinary] decisions as binding upon them."); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871) (it "would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed").

CONCLUSION

The writ should be granted pursuant to Rule 10(c) so the conflict among the lower courts about the important issue of first impression here can be resolved. Whether a church enjoys the full protection of the First Amendment should not depend on the state where it is located.

Respectfully submitted,

MARK E. CHOPKO
STRADLEY RONON
STEVENS & YOUNG, LLP
1250 Connecticut Ave., N.W.
Suite 500
Washington, DC 20036
(202) 822-9611
mchopko@stradley.com

JOHN T. KAEMPF
Counsel of Record
BROOKSBY KAEMPF PC
121 S.W. Morrison Street
Suite 1100
Portland, OR 97204
(503) 295-7755
jkaempf@brooksbykaempf.com

Counsel for Petitioners

February 7, 2011